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NON COMPOS MENTIS:

OR, THE

L A W

RELATING TO

NATURAL FOOLS, MAD-FOLKS,
and LUNATICK PERSONS,

Inquisited, and Explained, for Common Benefit.

By JOHN BRYDALL, Esq;
of LINCOLN'S-INN.

SENECA, Lib. xiv. Epistolarum, Epist. 94.

Siquis furioso præcepta det, quomodo loqui debeat, quomodo procedere, quomodo in publico se gerere, quomodo in privato, erit ipso, quem monebit, insanior.

L O N D O N :

Printed by the Assigns of Richard and Edward Atkins, Esquires; for Isaac Cleave, at the Star, next Serjeants-Inn, in Chancery-Lane. 1700.



T H E
A U T H O R
T O T H E
R E A D E R.

Seeing there have been exposed to Publick View, a couple of Tracts, the one entituled, *The Woman's Lawyer* ; and the other stiled, *The Infant's Lawyer* ; I have been induced to make a Publication of this perexiguous Piece, and have named it, *The Law of Non Compos Mentis* : It being no other than a Collection (methodically digested) of such Laws, with the Cases, Opinions, and Resolutions, of our common Law Sages, as do properly concern the Rights of all such, as are wholly destitute of Reason : Some
A 2 whereof

The Author to the Reader.

whereof are become so by a perpetual Infirmary, as *Idiots*, or *Fools Natural*: Some, who were once of good and sound Memory, but by the Visitation of God, are deprived of it, as Persons, in a high Degree, Distracted: Some, that have their lucid Intervals, (sometimes in their Wits, sometimes out,) as Lunatick Persons: And some, who are made so by their own Default; as Persons overcome with Drink, who during the time of their Drunkenness, are compared to Mad-Folks. All which Sorts of *Non Compos Mentis*, are the Subject Matter of the ensuing Sheets.

I shall no longer detain the *Reader* from the perusal of them, than by tendering him the good Advice, given by an ingenious Author, touching Witless Persons; which is as follows:

‘Take

The Author to the Reader.

‘ Take no Pleasure in the Folly of an
‘ Idiot, nor in the Fancy of a Lunatick,
‘ nor in the Frenzy of a Drunkard ;
‘ make them the Object of thy Pity,
‘ not of thy Pastime. When thou be-
‘ holdest them, behold, how thou art
‘ beholding to Him, that suffered thee
‘ not to be like them. This whol-
some Counsel of his, to embrace, will
be look’d on as an Act of Prudence :
But to reject it, will be such a piece of
Folly, as will undoubtedly bring him,
that shall be guilty of it, under the
hard Sentence, of our old *English* Pro-
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A

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-

The Reader is desired to Correct these Faults, before he begins : Other minuter Faults, of literal Errors, and Pointings, it is expected his Candor will pass over.

INstead of *Doth the Law*, read, *Doth not the Law*, p. 2. l. 22. Instead of *Br. 4. r. Br. Idiot 4.* p. 23. Instead of *an Act*, r. *a Tract*, p. 26. Instead of *Thompson's Case*, r. *Tourson's Case*, p. 27. Instead of *any Man make*, r. *any Man may make*. p. 34. Instead of *a Man seised*, r. *a Man died seised*, p. 47. Instead of *being seised of a Carve of Land in Fee*. r. *being seised of a Carve of Land, grant a Rent issuing out of the same Land in Fee*, p. 70. Instead of *tuentur*, r. *tenentur*, p. 77. Instead of *de prodictionibus*, r. *de actionibus*, p. 72. Instead of *detus*, r. *vetus*, p. 94.

A

T H E
L A W
O F
NON COMPOS MENTIS,
Inquisited and Explained.

BEFORE I come to Treat of the Law relating to persons of *Non Sane Memorie*, I shall by way of *Introduction* shew the Reader upon what Right the Dominion of *Infants*, *Idiots* and *Mad-men* is grounded. In performance whereof, I must be beholding to *Hugo Grotius* (that Prodigy of Learning) whose Words are these following:

“ If we respect (saith he) the Laws of Nature only,
“ no Right of Propriety can be admitted to those, who
“ have not the Use of Reason: But *Jus Gentium*, Lib. 2. Cap. 3. Sect. 6. *De jure belli & pacis.*
“ the Law of Nations, for
“ the Common Good, doth
“ indulge this Favour unto *Infants*, *Idiots* and *Mad-*
B “ *Men,*

The Law of *Non Compos Mentis*.

“ *Men*, that they may lawfully receive and retain the
 “ propriety of things. All Mankind in the mean time
 “ sustaining their Persons. For Humane Laws may con-
 “ stitute many things, that were Preternatural, but not

*Humana jura multa constituere
 possunt præter naturam contra na-
 turam nihil.*

“ any thing that is against
 “ Nature. And therefore
 “ that right of Dominion
 “ that, in favour to such,
 “ is by the unanimous consent of all Civiliz’d Nations
 “ thus introduced, may haply consist with the first Act
 “ of Dominion, which is a power to have and to hold
 “ things in Propriety ; but not with the second Act,
 “ which is freely and voluntarily to dispose of them with-
 “ out a Guardian (it being but Equal, that those that can-

*Æquum est, ut qui se regere
 non potest, regatur aliunde.*

“ not govern themselves,
 “ should be govern’d by o-
 “ thers.) For as to the right
 “ of Alienation, and the
 “ like, because in their own Nature they imply the Act of
 “ a Will, guided with (*a*) Reason, which *Infants, Idi-*

(*a*) *Alienatio rerum solidum
 desiderat habere judicium. Cas-
 siodorus II, II.*

“ *ots* and *Madmen* have
 “ not: Therefore doth the
 “ Law permit these Acts
 “ unto them, as to the Use
 “ and free Exercise of their Rights.

But here may be started a Question or two :

Quest. One whereof is this ; *If there be found a Peo-
 ple that have no use of Natural Reason at all, Whether
 all Right and Dominion may be taken from them ?*

Sol. It is not sufficient (saith *Grotius*) to justify a
 War, to pretend, that we were the first Discoverers of
 any place, in case it be possess’d, tho’ by Pagans and Infidels,

dels, or by Men of dull Apprehension ; for to entitle our selves to be the first Founders, 'tis necessary, that the Land so found should belong to none. Neither is it necessary to Propriety or Dominion, that a Man should be endued with Virtues Moral, or (a) Theological, or to be of a quick Understanding ; yet may this seem to be justifiable , That in case there can be found a People that have no use of natural Reason at all, there all Right and Dominion may be taken from them : Yet ought we in Charity to to make them such an Allowance as is necessary for their support and maintainance, as well as to other Ideots and Madmen. For as to what has been already said concerning the Care which the Law of Nations take to preserve the Property of Infants and Lunaticks, it appertains to such People with whom we have any commerce, or make any contract with, which we cannot have with such a People, as are wholly and altogether destitute of Reason ; and therefore of these it may be very well doubted, whether they have any Property at all. Grotius *De jure Belli & Pacis*, Lib. 2. Cap. 22. Sect. 9, 10.

Inventio est eorum, quæ nullius sunt.

(a) *A true Maxim in Divinity, Dominion is not founded in Grace ; Bishop Brownrig 1 Vol. of Sermons, p. 50. And Amesius in his Cases of Conscience, Lib. 5. Cap. 41. Qu. 1. Numb. 7.*

Quest. The other Question may be this, *If a King or Sovereign Prince be a Minor, or if he be not of sound Memory, whether such a one has Right to Govern ?*

Sol. For the Solution of this Question, we must distinguish, as in private Dominion, so in Empire, between the Right it self, and the exercise of that Right, or between the first act and the second ; for as a King

Grotius De jure belli & pacis, Lib. 1. Cap. 3. Sect. 24.

(though an Infant) hath a Right to Govern, but is not permitted to exercise that Right; so he that is *Furiosus aut captivus*, Mad, or a Prisoner, or that so lives in a Foreign Country, that he is not permitted freely to act in such matters, as concern the Good of that Empire, that is remote from him; for in all such cases they have their Lieutenants, or Vice-Roys to act for them: Wherefore *Demetrius* living under restraint with *Seleucus*, did forbid any Credit to be given

Plutarch in *Demetrius*, and
Peter de la Primadaie, in his
French Academy, cap. 50.

to his Letters, or unto his Seal; but commanded, that all things should be so governed as if he were dead.

Note, *Girard* affirmeth, that it hath been the Custom of the *French*, to honour their Kings, whatsoever they are,

De *L'Estate de France*, Lib. 1.
Sir John Hayward in the *Life*
of King William II. p. 151. Edit.
1613.

whether wise or foolish, valiant or weak, esteeming the Name of King to be Sacred, by whomsoever it be born.

And therefore they obeyed not only *Charles* the Simple, but *Charles* the sixth also, who reigned many years in plain distraction of his Mind. So when *Alexandrides*, King of *Sparta*, left two Sons, *Cleomenes* the Eldest, distracted in his Wits, and *Doricus* the youngest, both able and enclined to all Actions of Honour, the *Spartans* acknowledged *Cleomenes* for their King.

Having given the READER an Account upon what Right the Dominion or Propriety of Infants, Ideots and Mad-men is founded; I shall now proceed to treat of the Law of *England* (as also to mention *Sparsim*, here and there, the Roman and Canon Law) relating to such as are deprived of the Use of their Reason, Wits and Understanding.

A Man of Non sane Memorie, is termed among the Latines *Insanus, Fatuus, Amens, Demens, Mente Captus, Maniacus Furiosus, Stultus, Errore Mentis Affectus, a Rationis usu Destitutus Lunaticus*; and Non Compos Mentis; Of which several Terms, the last of all is most sure and legal; and according to our English *Leguleians* or Lawyers, Non Compos Mentis is of four sorts: First, *He that is an Idiot Born.* Next, *He that by Accident afterwards loseth his Wits:* Thirdly, *A Lunatick, that bath sometimes his Understanding, and sometimes not:* Lastly, *He, which by his own act depriveth himself of his right mind for a time, as a Drunkard.*

The several sorts of Non Compos Mentis in the Common Law

Co. Lit. 246. b. 247. a. Co. L. 4. *Beverley's Case.* *Cowell's Interpreter* Tit. Non Compos Mentis, and *Minshew's Guide into the Tongues*, 495.

Of these four sorts in their Order, and that by way of Description, by way of Remark, and by way of Query.

PART the FIRST.

Of him that is an Idiot Born.

SECT. I.

An Idiot or Natural Fool, who.

BEfore a Description be given of an Idiot, that from his Nativity, by a perpetual Infirmary, is *Non Compos Mentis*, it will not be much amiss to give some Account of the first Original of the Word [*Idiot*]: *Idiota* or *Idiotes*, is a Greek Word, and properly signifies a private Man, who is not employed in any Publick Office. Amongst the Latines it is taken for illiterate or foolish; and hence in *Cicero*, and other good Authors, *Idiota* signifies commonly an unlearned and illiterate person; In *Herodian*, he is said to be *ἰδιώτης qui rei alicujus est imperitus, ut ἰδιώτης τῆς ἰατρικῆς*. But among the English Jurists, *Idiot* is a Term of Law, and taken for one that is wholly deprived of his Reason and Understanding from his Birth; and with us in our common Speech is called a *Fool Natural*; of whom there has been given a Description by several of our Law-Authors.

Master *Fitzherbert* describes an Idiot thus: *He who shall be said to be an Idiot from his Birth, is such a Person, who cannot account or number twenty pence, or cannot*

tell who is his Father or

Nat. Brev. 579. B. de *Idiota*
Inquirendo.

Mother, or how old he is, &c. So that it may appear that he hath no understand-

ing of Reason, what shall be for his Profit, or what shall be for his Loss.

The Author of the Exposition of the *Terms of the Law*, gives this Description of him;

Idiot is he that is a Fool Natural from his Birth, and knoweth not how to account or number twenty pence, or cannot name his Father or

Mother, nor of what Age himself is, or such like easy

Tit. Ideot. f. 201. a. b.

and common Matters, so that it appeareth he hath no manner of understanding of reason or government of himself, what is for his profit or disprofit, &c.

An Idiot by the Civilian Swinbourn, is thus described.

An Idiot, or a natural Fool is he, who notwithstanding he be of lawful Age, yet he is so witless that he cannot number to Twenty, nor can

tell what Age he is of, nor

knoweth (b) who is his Fa-

ther or Mother, nor is able

to answer to any such easie

Question; whereby it may

plainly appear that he hath

not reason to discern what

is to his profit or damage,

though it be notorious, nor

is apt to be informed or

instructed by any other :

His Treatise of Testaments

and last Wills, Part 2. Sect.

4. f. 29. a. b. Edit. 1590.

Vide more of an Idiot's de-

scription in Stanford super

Prærog. Regis. c. 9. f. 34.

b. Edit. 1567. And M. 31.

l. 3. Tit. Saver de default,

p. 37.

(b) Quid ? Estne statim fatuus quisquis non potest demonstrare patrem ? Absit : Nam, ut concedam filium illum merito sagacem dici, suum qui novit patrem, certe si concluderem reliquos omnes esse fatuos, vereor, ne excluderem paucos Notum est, quod cecinit de Telemacho, insignis Homerus : Ex illo natum mater me dicit. At ipse nescio : Nam certum quis possit scire parentem ? Quod igitur scriptum reliquit Fitzherbert, Que tiel person serra dit Sot & Idiote, que ne scier dire qui fuit son pere ou mere, &c. ita exaudiendum est, si nesciat respondere, quis appellatur ipsius Pater.

S E C T. II.

Of the Remarks concerning Idiots.

I. R E M A R K.

IF a person hath so much knowledge that he can read, or learn to read by Instruction and Information of others, or can measure an Ell of Cloth, or name the days of the Week, or beget a Child, Son or Daughter, or such like, whereby it may appear that he hath some light of Reason, then such a one is no Idiot naturally. *Exposition of Terms of the Law, f. 201. b. Tit. Idiot. Stanford super Prærog. Regis, c. 9. Fitzherbert Natura Brevium, p. 519. B.*

II. R E M A R K.

An Idiot or Fool Natural, is incapable of making a Testament; nor can he dispose of his Lands or Goods: *Stat. of 34 & 35 H. 8. cap. 5. Swinbourn in his Treatise of Wills 2d Part, Sect. 4. f. 39. b. Godolphin's, Orphans Legacy, Part 1. cap. 8. numb. 3. p. 25. Cowel's Institutes Lib. 2. Tit. 12. Sect. 2. p. 115. Edit. 1605.*

III. R E M A R K.

If a Man be of a mean understanding (neither of the wisest sort, nor of the foolish'st) but, indifferent as it were, betwixt a Wise man and a Fool, yea though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *Grossum Caput*, a dull Pate, Duncie, such a one is not prohibited to make a Testament, *Swinbourn 2 part, sect. 4.* Or, as Godolphin expresseth himself,

himself; He, that only is of mean Capacity or understanding, or one who is, as it were betwixt a man of ordinary Capacity and a Fool, such a one is not prohibited from making a Testament, *Orphan's Legacy*, 1 part, cap. 8. numb. 3. But it is with this Proviso (says he) that he hath understanding enough to conceive what is the nature of a Testament, or last VVill, being well informed thereof, otherwise he being destitute of such understanding, is not fit to make a VVill. *Simon de præ. de Interp. ult. Vol. Lib. 2. Dub. 1. f. 4. Co. Lit. 6.* The Marquess of Winchester's Case.

IV. REMARK.

If a person be so very foolish, so very simple and sottish that he may be made believe things incredible or impossible, as that an Ass can fly, or that in old-times Trees did walk, Beasts and Birds could speak, as it is in *Aesop's Fables*; for he that is so foolish, cannot make a Testament, because he hath not so much wit, as a Child of ten or eleven years old, who is therefore intestable, namely, for want of Judgment, *Swinbourn* 2 part, p. 4.

Testamentum facere non possunt Impuberes, quia nullum eorum animi Judicium est. Instit. 2. 12. 1. Cod. 6. 22. 4.

V. REMARK.

Although by the Laws of this Land, He that can measure a Yard of Cloth, or rightly name the days of the VWeek, or beget a Child; shall not be reputed an Idiot or a natural Fool; yet it will not be indisputably granted, that an act so natural as the begetting of a Child, can so qualifie a natural Fool, so as to render him in the charitablest construction of Law Testable; for if he be such a

natural Fool, as that though of Lawful Age, yet cannot declare of what Age he is, nor number twenty, nor knoweth his natural Parents, by their several Names and Relations; and the like easie Questions, such

(a) *Cum Lege quis intestabilis jubetur esse, eo pertinet, ne ejus testimonium recipiatur, & eo amplius (ut quidam putant) neve ipsi dicatur Testimonium, D. 28. 1. 26.*

an Idiot is undoubtedly intestable. (a) Godolphin in his Tract, Intituled, *The Orphan's Legacy*, part 1. c. 8.

VI. REMARK.

Notwithstanding all which, if it may appear by sufficient conjectures and circumstances, that such Idiots had the use of Reason and Understanding at such time as they did make their Testaments, then are such Testaments good and valid in Law. 3 Eliz. Dyer 203, 204. Swinbourn 2 part, sect. 4. Godolphin in his *Orphans Legacy*, part 1. cap. 1. And yet (says the same Godolphin) if he be an Idiot indeed, albeit he may make a wise reasonable, and sensible Testament as to the matter of it, yet it will be void.

VII. REMARK.

To make a Promise or Contract compleat and binding, the use of Reason is required in the promiser or contractor, which renders the Promises or Contracts of Idiots, Mad-men and Infants void and of no force in the Laws of all Countries. *Grotius de jure belli & pacis, lib. 2. cap. 11. sect. 5. Briton cap. 28. f. 61. b. 63. a.* And what is said of Contracts and Promises, is true also in the Case of Oaths, namely, That he that Swears should be of sound Mind, and should use great deliberation before he takes an Oath; of which sound Mind and deliberation

beration, Idiots, Madmen and Infants are not capable.
Grotius of the Rights of War and Peace, lib. 2. cap. 13. sect. 2.

VIII. R E M A R K.

He that is a Fool natural, or a Mad-man, is incapacitated to be a Judge, for want of Knowledge and discretion. *Mirror c. 2. sect. 2. p. 115, 116. Edition, 1642.*

IX. R E M A R K.

An Idiot, or Fool natural is incapable of being made an Arbitrator called in Latine [*Compromissarius Judex.*] For the Law dictates, that such Persons be elected Arbitrators as have sufficient skill of the matter submitted to them, and have neither Legal nor natural impediment; That they be not Infants, who by reason of their few years want discretion and knowledge; that they be neither Madmen nor Idiots, for such are void of reason and understanding, *West. Symb. 2d part, Sect. 23, 26, 27.* Author of a Tract Entituled, *Arbitrium Redivivum. cap. 4. p. 19. D. 4. 8, 9.*

X. R E M A R K.

Every one cannot make an Attorney; for an Infant within Age, a Mute, a deaf Man, a Fool natural, a man distracted in his Wits, or otherwise without discretion, are incapable of constituting Attornies, *Britton, cap. 126. f. 285. b. Mirror cap. 3. sect. 10. p. 194.*

*Chescun ne puit mye faire At-
 torne: car Enfant de dens age, ne
 muet, ne surd, ne fol naistre, ne
 home arrage, ou autrement sans
 discretion, ne puit mie faire At-
 tornes.*

XI. R E

XI. R E M A R K.

All such persons are capable to be Essoigners, or Excusators, as are not prohibited by Law; but there are some that are forbidden; among which number are Infants, all such as are in VVard, Excommunicated persons, Madmen and Fools natural, *Mirror of Justices*, cap. 2. sect. 30. p. 175.

XII. R E M A R K.

If a Suit be brought against another, he may say, that he ought not to answer the Demandant or Plaintiff, for he is an Excommunicate person, a Madman, an Infant or a Fool from his Nativity; and it shall be a good Plea or Exception to the Demandant or Plaintiff's Suit or Action, *Fleta*, lib. 2. cap. 54. numb. 3. p. 116. and lib. 6. cap. 38. numb. 1. p. 431. and cap. 40. numb. 1. p. 434. *Bracton* lib. 5. tract. 5. cap. 20. numb. 1. f. 420. b. *Mirror des Justices*, cap. 2. sect. 3. f. 117.

XIII. R E M A R K.

There is required in them who contract Matrimony, a sound and whole Mind to consent; for he that is either an Ideot or Madman, without intermission of Fury cannot Marry. *The Womans Lawyer*, lib. 2. sect. 10. p. 57. Edit. 1632. This Consent (saith *Amesius*) must be voluntary and free, else it's not esteemed a humane consent; and hence the consent of such as have not the use of Reason is no force to such a Contract, *Lib. 5. cap. 35. Qu. 4.*

XIV. R E -

XIV. REMARK.

A Man that is Deaf and Dumb, and yet hath Understanding, may Attorn by signs; but one that is *Non compos mentis*, as an Idiot, cannot attorn, for that he hath no understanding, cannot agree to the Grant, *Co. Lit. f. 315. a. 26 E. 3. 63. 18 E. 3. 53. 6 Co. f. 69. a. Sir Moyle Finch's Case.*

XV. REMARK.

Minoribus acquiruntur possessiones, & naturaliter fatuis, & furiosis per Tutores inde, aliter vero minime eo quod intellectum recipiendi non habent, nec retinendi: Curatores autem sanum intellectum oportet habere, quia si minorem fatuum a Nativitate, vel furiosum miseris ut possideas, nequaquam videris per eos possessionem apprehendisse, quia intellectum non habent, Fleta lib. 3. c. 15. nu. 14. p. 203. Vde Bracton, lib. 2. c. 18. nu. 6. f. 43. b.

XVI. REMARK.

It appears in the old Books of Law, that it was expedient that Ideots should have a Curator or Tutor, or one that should take the charge of their Persons, Lands and Goods, which Office since is devolved to the King, and made parcel of his Prerogative, *17 E. 2. cap. 9.* As *Fitzherbert* very well saith, in his *Natura Brevium*.
The King is the Protector of all his Subjects, their Goods, Lands and Tenements, and therefore of such as cannot govern

Bracton, lib. 5. tract. 5. c. 20. nu. 1. f. 420. b. Fleta lib. 1. c. 11. nu. 10. Cowel's Institutes, lib. 1. tit. 23. sect. 1. de Curatoribus.

vern themselves, *Stamford Sur Prærog. Regis, cap. 9.*
Britton c. 66. f. 167. b. Sir Thomas Smith's Common-
weath, lib. 2. c. 4. p. 98. Eng. Edit. 1640.

XVII. REMARK.

The King having the custody of the Persons and Estates of Idiots, can let to Farm, rendring Rent, all the Possessions of a Fool natural, but not that which he hath Title unto, or Action: And therefore upon an Office (finding that the Idiot's Ancestors died seized of an Estate Tail) it is sufficient to Traverse the dying seized, for that only entitleth the King, 31 E. 3. *Saver de Fault, 37. 1 H. 7. 24. Finch's Law, lib. 2. c. 2.*

XVIII. REMARK.

By the Common Law the King shall have as great protection of the Goods and Chattels of an Idiot, as of his Lands, and that as well the scattering of his Goods and Chattels, as the Alienation of his Lands is to be remedied and redressed by the King, to whom the Law hath given the Protection and Custody of him.

XIX. REMARK.

As after Office found, an Idiot cannot Alien, Give, &c. So Alienations, Gifts, &c. made before Office found shall be avoided after Office thereof found, for no Latches shall be found in the King, nor any prejudice thereby shall accrue to the Idiot for not suing the Office before the Feoffment of Gift, 4 Co. f. 428. *Beverley's Case.*

XX. R E-

XX. REMARK.

If the Idiot dies before Office found, after his Death, no Office can be found ; for the words of the Writ are, *Et ipsum viis, & modis quibus super statu suo melius poteritis informari circumspicite. examinaretis, &c.* which cannot be done when he is dead, and without Office, the King cannot be entituled, 16 E. 3. Livery 30. 4 Co. f. 128. *Beverley's Case.*

XXI. REMARK.

When the King is informed, that one, who hath Lands and Tenements, and is a natural Fool from his Birth, the King may award his Writ, called *Idiota inquirendo vel examinando*, which directed to the Escheator, or Sheriff of any County, where the King hath information, or understanding that there is an Idiot naturally so Born, so weak of Understanding that he cannot govern or manage his Inheritance, to call before him the Party suspected of Idiocy and examine him; and also to inquire by the Oaths of twelve Men, whether he be sufficiently witted to dispose of his own Lands with discretion or not, and to certify accordingly into the Chancery, for the King (as hath been said before) hath the Protection of his Subjects, and by his Prerogative the Government of their Lands and Substance, that are naturally defective in their own discretion,

Doctor Cowel's Interpreter, *Brevia de inquirendo de Idiota tit. Idiota inquirendo, &c.*

Minshew's Guide to the Tongues 373. Note; The several Forms of the Writs in Latine, directed either to the Escheator, or the Sheriff are to be seen in the Register Orig. f. 266. a. b.

XXII. RE-

XXII. REMARK.

When a Man is found an Idiot from his Birth by Office, he, who is so found Idiot (falsely as he supposeth)

The manner how he that is falsely found to be an Idiot, shall avoid the Office.

may come personally into Chancery, before the Chancellor, and pray, that before him, and the Justices

and Sages of the Law, which he shall call to him (and are called the King's Council) he may be examined, if he be an Idiot or not; or by his Friends he may sue

forth a (a) Writ out of the Chancery, returnable in the Chancery, *ibidem coram nobis, & consilio nostro ex-*

(a) *The Writ De Idiota coram consilio ducendo ad examinandum, Reg. Orig. f. 267.*

aminand. And if he be found upon examination that he is no Idiot, the Office found thereof, and all the Examinations which hath been made by force of the Writ, or the King's Commission, is utterly void, without any Traverse, or *Monstrans de droit*, or other Suit; as appeareth by the Register Orig. f. 267. and F. N. B. 233. vide 15 E. 3. in Fitz. Tit. Livery 306. 9 Co. f. 31. The Case of the Abbot of Strata Marcella. Stamford super Prærog. c. 9. f. 34. a. 36 a. Edit. 1567.

XXIII. REMARK.

If a *Scire Facias* be awarded against the Feoffee of an Idiot, and the Feoffee appearing, upon the *Scire Facias*, may traverse the Idiocy, as appears he did in the Book of 18 E. 3.

XXIV. REMARK.

The Law gave the King but the Custody of the Lands of the Idiot; and altho' the same continued during the Life of the Idiot, yet having but the Custody, the King hath not the Freehold, or Fee, but the Freehold is in the Idiot. For the Statute of *Prærogativa Regis*, c. 9. saith, *Quod post mortem eorum reddet ea rectis Hæredibus*: That after the Death of such Idiots, he shall render it to the right Heirs, 17 E. 3. 11. 13 E. 3. *Saver Default* 37. 4 Co. f. 126. b. *Beverley's Case*.

Stamford Super Prærog. c. 9. is of the same Opinion; Tho' the King (saith he) has the possession during the Idiot's Life, yet the King hath 1 H. 7. 15. not the Freehold thereby, but only a bare Custody, for the Freehold remains in the Heir.

XXV. REMARK.

The King ought not to seize an Idiot's Lands, until such time as he is found an Idiot by Office. *Stamford Super Prærog. Regis*, c. 9.

XXVI. REMARK.

The Office, when a Person is found to be an Idiot, shall have relation *a Nativitate*, to avoid all mean Acts done by him; that is to say, Feoffments, Releases, or the like. *Fitzherbert*, and *Stamford, Super Prærog.* c. 9.

XXVII. R E M A R K.

Altho' the Statute of *Prærogativa Regis*, c. 9. saith *Custodiam Terrarum*, yet the King shall have as well the Custody of the Body, and of the Goods and Chat-

Consilio & Opera Curatoris tueri debet non solum Patrimonium, sed & corpus & salus furiosi seu fatui, D. 25. 10. 7.

tels of Idiots, as of their Lands, and other Hereditaments, as well those which they have by Purchase, as those which they

have as Heirs by the Common Law. 4 Coke, f. 127. *Beverley's Case*.

XXVIII. R E M A R K.

The Person, by the Statute, ought to be an Idiot, *Nativitate*, sc. *Fatuus Naturalis*, and not by Accident or Infirmitie: For if he were once Wise, and became Fool by Misfortune, the King shall not have the Custody of him. 18 E. 3. Fitz. Tit. *Scire Facias*, Pl. 10. Fitz. *berbert's Natura Brevium*, Stamford Super *Prærog. Regis*, c. 9. f. 34. b. 4 Co. *Beverley's Case*.

XXIX. R E M A R K.

No Feoffment, Gift, Lease, or Release, that an Idiot can make of his Inheritance, but it may be avoided, during his Life; which is apparented by these words of the Prerogative Statute: *Ita quod nullatenus per eosdem factuos alienentur, nec quod eorum Hæredes exhæredentur*. So that such Idiots shall not alien, nor their Heirs shall be disinherited, 4 Co. 127. *Beverley's Case*, Stamford Super *Prærog. Regis*, c. 9. f. 35. b. Edit. 1567.

XXX. R E M A R K.

The King is to take the Profits belonging to the Idiot to his own use, finding him Necessaries ; and this is evidenced by the words of our Statute : *Capiendo necessaria sua. Stamford Super Prærog. Regis, c. 9. f. 34. b.* The King (says *Wingate*) shall have to his own use all the Possessions of a Fool Natural, during his Idiocy. *His Body of the Common Law of England, c. 2. of Possessions, Nu. 3.*

XXXI. R E M A R K.

The King is bound to Reparations of the Idiot's Lands and Tenements ; for the words of the Statute are, *The King shall have the Custody of the Lands of Natural Fools, taking the Profits of them, without waste, or destruction. Stamford Super Prærog. Regis, cap. 9. f. 35. a.*

XXXII. R E M A R K.

The King, by the Statute of *Prærogativa Regis*, is to be preferred in this Title of Idiocy, before any other Lord which might claim the Idiot as his Ward ; and this is evidenced by the words of the said Statute, *De cujus-
cunque feodo Terræ illæ fuerint : Of whose Fee soever
the Lands be holden. Stamford Super Prærogativam
Regis, c. 9. f. 35. a. Edit. 1567.*

XXXIII. R E M A R K.

If one be found an Idiot by Office, and before the King doth make a Seizure of the Lands, the Idiot departs
C 2 this

this Life, yet the King shall seize the Lands, because of these words of the Statute, *Post mortem eorum eam rectis Hæredibus*: After the Death of such Idiots, he shall render it to the right Heirs. Which the King cannot do, but upon a Seizure. *Stamford Super Prærog. Regis, c. 9. f. 34, a, b.*

XXXIV. R E M A R K.

When an Idiot doth sue, or defend, he shall not appear by *Guardian*, or *Prochein Amy*, or *Attorney*

Idiota a natiuitate non recipitur, vel ad agendum, vel defendendum in aliqua causa, per Custodem, vel proximum propinquum sed requiritur, ut ipse semper præsens sit in propria persona. Cowell's Institutes, lib. 1. tit. 23. sect. 6. de Curatoribus.

but he must be ever in Person; and whosoever will plead best for him, shall be admitted, 33 H. 6. 18. 2 H. F. N. B. 27. G. Co. Lit. f. 13. b. *Stamford c. 9. 35. b. 36. a.*

4 Co. 124. b. *Beverley's Case.* Saunders Rep. 2 Part, f. 33. Dennis, v. Dennis. But an Infant; or a Minor, shall sue by *Prochein Amy*, and defend by *Guardian*. 27 H. 8. 11. 40 E. 3. 16. 20 E. 4. 2. F. N. B. 27. H. Co. Lit. f. 135. b. Cro. Jac. f. 640, 641. Simpson, & Simpson v. Jackson. 4 Co. f. 124. b. *Beverley's Case.*

XXXV. R E M A R K.

By the Statute of *Westmin. 2 c. 15.* it is ordainee That if an Infant be eloined, he may sue by *Prochein Amy*; but this same Statute extendeth not to an Idiot. Co. Inst. f. 391.

XXXVI. R E M A R K.

A Descent shall not take away the Entry of an Idiot, albeit the want of Understanding was perpetual ; for *Cook in his Comment on Littleton, sect. 405. speaks generally of a Man of Non sane Memorie. Vide Noy's Treatise of the Grounds of the Common Law, Cap. 16. Of Descents.*

XXXVII. R E M A R K.

If an Idiot makes a Feoffment in Fee , he shall in Pleading never avoid it, by saying, That he was an Idiot at the time of his Feoffment , and so had been from his Nativity : But upon an Office found for the King, the King shall avoid the Feoffment for the benefit of the Idiot, whose Custody the Law giveth to the King, 39 H. 6. 42. b. F. N. B. 202. 5 E. 3. 70. Britton, cap. 28. f. 66. a, b. Coke in his Comment on Littleton, sect. 405. f. 247. a. Stamford, in his Exposition of the Statute of 17 E. 2. cap. 9.

XXXVIII. R E M A R K.

A Copyholder of unsound Memory, an Idiot, or Lunatick, cannot forfeit his Estate. Sheppard in his Treatise, entituled, *The Court-Keeper's Guide*, cap. 22. p. 172. Edit. 1656:

XXXIX. R E M A R K.

A Grant, or Surrender of Copyhold-Land, made by an Idiot, is not valid in the Laws of England. Shep-

pard's Court-Keeper's Guide, Cap. 19. Page 117, 118.

XL. R E M A R K.

A Surrender, or Grant of Copyhold-Land, may be made to an Idiot, or any other Man of unsound Memory, and good in Law. *Sheppard*, Cap. 19. p. 118, 119.

XLI. R E M A R K.

By the Statute of 32 H. 8. c. 46. the Master of the Court of Wards, and Liveries, by the Advice of the

Note, This Act of 32 H. 8. for the Erecting of the Court of Wards, is taken away by the Statute of 12 Car. 2. c. 24.

Attorney, Receiver-General, and Auditors, or three of them, had Authority to survey, govern, and order all and singular Idiots, and

Natural Fools, now being in the King's Hands, or that hereafter shall come, and be in the King's Hands; and to survey and order all the Mannors, Lands, Tenements, and other Hereditaments whatsoever; and also to let, and set the same to the King's Use, for the time of the King's Interest, for such Rent, and fined as by their Discretion shall be thought convenient; the finding and keeping of the said Persons, their Wives and Children, and the Reparations of their Houses and Lands, always to be considered in the doing thereof, &c.

Note, Tho' these Officers of the Court of Wards and Liveries, had Power to let and set the Lands of Idiots, and Natural Fools; yet, according to the Sentiment of *Stamford*, they had no Power to grant the Custody of their Bodies.

XLII. R E M A R K.

Regularly, Conveyances, or other Acts of Record, acknowledged, or made by one that is an Idiot, are unavoidable by him, or his Heirs, in the Laws of *England*.
4 Co. *Beverley's Case*.

XLIII. R E M A R K.

If an Idiot, or other *Non Compos Mentis*, does levy a Fine, and declare the use thereof, this Declaration shall bind him as long as the Fine continues in force; for inasmuch as he hath been admitted by the Judges, as a Man that hath the use of Reason, the Law, as long as the Fine remains in force, permits him to limit the use thereof, 10 Co. 42. b. *Mary Portington's Case*. 2 Co. f. 58. *Beckwith's Case*, 12 Co. f. 123, 124. *Mansfield's Case*.

XLIV. R E M A R K.

There is a diversity taken between an Idiot, and an Unthrif, or Spendthrift; as appears in the Case of one *Brent*, of the County of *Somerset*, who was presented for an Idiot; but it was evidenced, That he could write Letters, and make Acquittances, and such-like; whereupon he was adjudged an Unthrif, but no Idiot. *Br. 4. in Fine*.

Note, That as Minors have Curators, and Governors, so also mad Persons, and Spendthrifts, Unthrif, or prodigal Persons, are appointed by the Civil Law of the *Romans*, to have Governours; for that they can no more govern their own State, than the others can: For they, and such as know no time, nor end of Spending, but riot, or lavish out their Estates, without all Discretion;

and for their sakes I will here subjoyn the Sentiments, that the old *Roman* Jurists have had of these Prodigals, or Spendthrifts.

Note, *Cicero* 3 *de Officiis*, tells us, That there was a Law made by *Lætorius*, which provided, that there should be appointed for those which were Distracted, or did prodigally waste their Patrimony : For as it appeareth by the common Adage used among the *Romans*, *Ad Agnatos & Gentiles deducendus est* : They did account all Prodigals or Spendthrifts, Mad men ; they meaning no more by that, than we do by our *English* Proverb, *Let him be begged for a Fool*. The Reason of their Adage was, because if any were distracted; by the *Roman* Law his Wardship fell *Ad Agnatos & Gentiles*, i. e. to the next of the Kindred. *Goodwin's Roman Antiquities*, lib. 3. sect. 4. c. 24.

Qui Eversores, aut insani sunt, (saith *Caius*) *omni tempore vitæ suæ sub Curatore esse jubentur : Quia substantiam suam rationabiliter gubernare non possunt*, Lib.2. Tit. 8. de Curationibus.

Lege 12 Tabularum (says *Ulpian*) *Prodigo interdicatur bonorum suorum administratio. Quod moribus quidem ab initio introductum est, sed solent hodie prætores, vel præsides, si talem hominem invenerint, qui neque tempus, neque finem expensarum habet, sed bona sua dilacerando, & dissipando profudit, Curatorem ei dare exemplo furiosi. Et tam diu erunt Ambo in Curatione, quam diu vel furiosus sanitatem, vel ille sanos mores receperit ; quod si evenerit, ipso jure desinunt in potestate Curatorum*. D.28. 10. 1.

Divus pius (saith the same Lawyer, *Ulpian*) *matris querelam de filiis prodigis admisit, ut Curatorem accipiant in hæc verba : Non est novum, quosdam etsi mentis suæ videbuntur ex sermonibus Compotes esse : Tamen sic tractare bona ad se pertinentia, ut, nisi, subveniatur his,*
dedu-

deducantur in Egestatem. Eligendus itaque erit, qui eos consilio regat: Nam æquum est, prospicere nos etiam eis, qui quod ad bona ipsorum pertinet, furiosum faciunt exitum. D. 25. 5. 12. 2.

Furiosi (saith Pomponius) vel ejus cui bonis interdictus sit, nulla voluntas est. D. 50, 17. 40.

Hence it is, that Spendthrifts, or Prodigals, are forbidden to make their Testaments, or to dispose of their Lands or Goods any other ways, *Instit. 2. 12. 2.*

D. 28. 1. 18. Swinburn in his Tract of Testaments, and Last Wills. 2d Part, sect. 24. Ulpianus, Tit. 20. de Testamentis.

Is cui lege bonis interdictum est, testamentum facere non potest, & si fecerit, ipso jure non valet. Ulpian.

Among the Grecians, such as were Spendthrifts, were branded with Infamy.

Decoctores paternæ, aut alterius cujusvis hereditatis ignominiosi sunt: All wild Extravagants, and Spendthrifts, who lavishly run out the Estates left them by their Fathers, or others, shall be Ἀλιμῶ.

From the Remarks touching Idiots, or Fools Natural, we come to our Queries, attended with Solutions, relating to them.

S E C T. III.

The Queries, with their Solutions, concerning Idiots, or Natural Fools.

I. QUERY.

If the King commit the Body, or Estate, of an Idiot, to J. S. to do with them as he pleases, whether this Grant be good?

SOLUTION.

THE Estate, and Persons of Idiots, and Lunaticks, are by Law intrusted with the Supreme. Should the Sovereign Trustee commit the Body, or Estate, of either of them, to J. S. to do with them as absolutely, and inordinately, as he pleases, the Grant were void; because Breach of Trust; and the Committee punishable for any exorbitant Usage. *The Author of an Act, entitled, Defensio Legis, Sect. 10. Par. 81. p. 139. Edit. 1674.*

The Estates and Persons of Idiots, and Lunaticks, (saith the Lord Chief Justice *Hobart*) are by Law intrusted to the King; if therefore the King should grant to one, that intrudeth upon the Possessions of an Idiot, or Lunatick, or take their Persons unlawfully, that he would not meddle with them, but suffer them to do their pleasure, these Grants were void: For these are Acts of Justice, and Offices of a King, which he cannot put off: *Cessa regnare, si non vis judicare.* And in these things the King is never supposed by Law ill affected, but abused and deceived; for *Eadem præsumitur mens Regis,*
quæ

quæ est Juris. Hobart's Reports, f. 155. Colt and Glover, v. Bishop of Coventry and Litchfield.

Princeps jura tueri præsumitur, Princeps Custos legis, C. 3. 28, 35. D. 43. 8. 1. 10.

II. QUERY.

Whether the King shall have the mean Profits, from the time of the first Seizure of the Idiot, or from the time of the Office found?

SOLUTION.

William Tourson, an Idiot from his Birth, by force of a Remainder, after the Death of his Father, was jointly seized with his Elder Brother, for Term of their Lives; the Lessor did purchase the Estate of the Elder Brother, and took the Body of the Idiot, and all the Profits of the Lands; and afterwards, *William Tourson* was found Idiot from his Birth, by Inquisition: The Question was, Whether the King shall have the mean Profits of the Moiety from the time of the first Seizin of the Idiot, or from the time of the Office? And it was resolved, That the King should not have the Profits, but after the Office; and yet to some intent the Office shall have relation from the time of the Birth, *Scilicet*, to avoid all mean Acts done by the Idiot, and therewith agreeth *F. N. B. 202 E.* and *18 E. 3.* — *Scire Fac. 10. 32 E. 3.* *Scire Fac. 106. 50 Aff. Pl. 2.* But for the mean Profits, it shall not have relation, but from the time of the Office found; for the same appeareth of Record, that the King hath Right to seize the Lands: As if the King's Tenant commit Felony, *Anno 1 Jac.* and afterwards, *Anno 3.* he is attainted for the same Felony; and

and afterwards, *Anno 4.* all is found by Office : Now this Office shall have relation to the time of the Felony, to avoid all mean Alienations and Incumbrances ; but for the mean Profits, it shall have relation to the time of the Attainder, for then the King's Title appeareth of Record ; and there is a difference where the King shall have the Custody, by reason of a Seigniory, as in the Case of Wardship, there the King after Office found, shall have the mean Profits from the time of the Death of the Ancestor, for the King hath Wardship by reason of his Seigniory, and he loseth his Rent, and Services in the mean time. But the King hath the Custody of an Idiot, not in respect of any Seigniory, but in the Right of his Royal Protection, because that his Subject is not able to govern himself, nor his Lands, or Tenements which he hath ; and this Protection doth begin by the Office found. And the Statute of *Prærogativa Regis*, c. 9. saith, *The King shall have the Ward of Lands of Natural Fools, taking the Profits, &c. to find them Necessaries, &c.* By which it appeareth, that the King shall take the Profits from the time that he is charged with the finding of the Idiot, and his Family, Necessaries, &c. and that is after the Office found ; so that when the King seizeth in the Right of his Regal Protection, as in the Case at Bar, or *Nomine districtiōis*, as in Case of Alienation of Lands in *Capite*, without License, or of Marriage of his Widow, without License ; there, after Office found, the King shall not have any of the mean Profits before the Office, as it is holden in 8 E. 4. 4. 40 *Aff. Pl.* 36. But when the King seizeth by reason of a form'd Right, or Title, there the King shall have the mean Profits, from the time of his Right or Title first accrued, as 18 *Aff. Pl.* 18. from the time of a Condition broken, 41 E. 3. 21. from the time of the Alienation of his Tenant in Mortmain : And if the Lands holden of others, from the time the Title came to him, 46 E. 3. Forfeiture 18; upon the

Sta

Statute of *West. 2. c. 45.* which giveth the *Contra formam Collationis*, from the time of the Alienation; for by these Acts the King's Title and Right doth accrue: And in the principal Case, no Precedent can be found, that the King was answered the mean Profits before the Office found, but only after the Office; and so the *Quere* in *Stamford's Prærogativa Regis*, 34. is well resolved.

III. QUERY.

At what time was the Prerogative in the Custody of Idiots Lands conferred on the Crown, during the Life of an Idiot, or Natural Fool?

SOLUTION.

Sir *Edward Cook* tells us, That at the making of the Statute of *Magna Charta*, c. 4. *Anno nono Henrici tertii*, the King had not any Prerogative in the Custody of the Lands of Idiots, during the Life of the Idiot: For if he had had, this Act of *Magna Charta* would have provided against Waste, &c. committed by the Committee, or Assignee of the King, to be done in their Possessions, as well as in the Possessions of Wards; but at this time the Guardianship of Idiots, &c. was to the Lords, and others, according to the Course of the Common Law. And Idiots, from their Nativity, were accounted always within Age; and therefore, the Custody of them was perpetual, so long as they lived, for that their Impotency was perpetual: And the Lord of whom the Land was holden, had not a Tenant that was able to do him Service, and therefore within the Reason of a Custody of a Minor, or of an Heir within Age, in Case of Wardship. And this appeareth by *Fleta*, who attesteth, That anciently Idiots, or Natural Fools, were in the Custody of the Lords: *Solent* (says he) *Tutores terras Idiotarum, & Stultorum cum Corporibus eorum Custodire suo per-*

Lib. 1. c. 11. nu. 10. p. 6.

Vide Bracton, lib. 5. tract. 5.
c. 20. nu. 1. f. 420. b. Cowell's
Instit. lib. 1. tit. 23. sect. 1.
de Curatoribus.

perpetuo, quod licitum fuit
& permissum, eo quod seip-
sos regere non noverunt ;
nam semper judicabantur
infra ætatem, vel quasi ;
verum, quia plures per hu-

jusmodi Custodiam Exhæredationem compatiiebantur, pro-
visum fuit & communiter concessum, quod Rex Corporum,
& Hæreditatum hujusmodi Idiotarum, & Stultorum sub
perpetuis Custodiis obtineret, dum tamen a nativitate
fuerint Idiotæ, & Stulti : Secus autem si tarde a quo-
cunque Domino tenuerunt, & ipsos maritaret, & ex omni
exhæredatione salvaret, hoc tamen adjecto, quod Domi-
nis Feodorum, & aliis quorum interfuerit, ut in Servi-
tiis, Reditibus, & Custodiis, usque ad legitimam ætatem
secundum Conditionem Feodorum, releviis, & hujusmodi,
nihil juris deperiret.

But then it is demanded, When was this Prerogative
given to the King ? Certain it is, that the King had it be-
fore the Statute of 17 E. 2. *de Prærogativa Regis*, for
it appeareth in our Books, that the King had this Prero-
gative, Anno 3 E. 2. And before that, it is manifest,
that the King had it before Britton wrote, in the Reign of
E. 1. as you may read in his Book, Cap. 66. *De Gardes*,
f. 167. b.

And it is as clear, that when Bracton wrote, (who
wrote about the end of the Reign of H. 3. that the King
had not then this Prerogative. And therefore it follow-
eth, that this Prerogative was given to King E. 1. before
that Britton wrote, by some Act of Parliament, which is
not now extant. And it appeareth by the *Mirror of Ju-
stices*, agreeing with *Fleta*, that this Prerogative was
granted by Common Assent, Vide Lib. 4. f. 125. *Bever-
ley's Case*.

Hitherto Coke ; And now let us see what Stamford
saith to this Point : ' This Prerogative of the King,
(quoth

(quoth he) to have the Custody of an Idiot, begun in the time of King E. 1. as it should seem to him, because he finds none that wrote of it before Britton; for Bracton speaks but little of Idiots in his Fifth Book, in the Title of Exceptions against the Plaintiff, where he saith, *It is a good Exception for the Person of him that complaineth, or bringeth any Action to say, He is a Fool Natural*; because

Competit exceptio peremptoria tenenti ex persona petentis, si petens fuerit non sanæ mentis quod discernere nesciat, vel omnino nullam habeat discretionem. Talis enim non multum distat a Bruto, quod Ratione caret. Sed discussio huiusmodi exceptionis, discretioni, iudicis relinquatur. Bracton, lib. 5. tract. 5. c. 20. nu. 1.

such a one differeth not much from a Beast that wants Reason: But the discussion of such a kind of Exception is left to the discretion of the Judge. Howbeit, Britton, f. 167. b. saith, That the King ought to have this Prerogative herein; for these be his very words: *Et pur ceo que ascun foitz avient que ascun Heir est Sot naistre par quoy il nest my able a heritage demaunder & garner, volons que tielz Heires, de qui qu'il unques tenent malle & femelles demoergent en nostre garde ovesque tout autres services que a luy appendent de terre tenue de luy, & issint remeynent en nostre garde, taunt come ils durent en leur sotise.*

Upon these words of Britton by the by, Stamford notes three things: 1. That the King shall not have the Custody during their Lives, but during their Idiocy. 2. That notwithstanding the Land is in the King's Hands, yet the Lords shall have their Seigniories, which is by way of Petition. 3. That the other Lord shall not have the Wardship of the Heir, nor of his Lands, but only the King; which third thing, (says he) by the Statute of Prerogative is not so plainly set forth.

IV. QUERY.

Whether the Ter-Tenant shall be allowed to traverse an Office of Idiocy, upon a Scire Facias brought against him by the King?

SOLUTION.

It was found by an Inquest of Office returned into Chancery, that *W. N.* was seized of certain Mannors, and they were held of the King in Chief, and died seized, and the Tenements descended to *R.* a Fool Natural from his Nativity, as Son and Heir; and that *N.* held the Tenements: Whereupon the King sued a *Scire Facias* against *N.* to shew Cause why the King should not seize the Lands into his Hands for the Idiocy of *R.* who comes and says, That *R.* such a Day released all his Right to the Possession, to *M.* at the making of which Deed, *R.* was of good Memory, which *M.* infeoffed him, without that *R.* was a Fool Natural from his Nativity; and it was not denied, but that the Ter-Tenant may traverse the Office in this Form.

50 *Aff. Pl. 2. Br. Gr. Abridgement, Tit. Idiots.*

V. QUERY.

Whether there be any Diversity in the Case of the King, to Answer either to the Tenure, or to the Possession?

SOLUTION.

1 *H. 7. 18, 19. 2 H. 7. 3. Broke's Grand Abridgment, Tit. Idiots.*

An Office was found, that *J. S.* died seized of such Lands by Gift in Tail, made

made to him, which descended to *W.* his Son and Heir, who was an Idiot ; and *N.* comes and traverseth the Office, making Title, *Absque hoc quod dict. J.S. fuit seise, prout, &c.* the Day he died, and it was found against the King. And by *Hussey*, and *Fairfax*, the Case of Idiocy is not like to the Case of the Ward of Land, and Heir : For there the King shall answer to the Tenure ; but in the Case of an Idiot, the King shall answer only to the possession : For if an Idiot has Title to Land, either by Entry, or by Action, if he has it not in possession, the King shall not have it ; and so Judgment was given upon the Traverse, for the Issue was upon the possession, and it matters not, whether the Idiot had Right or not, if he had not the possession.

VI. QUERY.

Whether an Idiot, or Fool Natural, can be bound by the Sale of his Goods in Market Overt ?

SOLUTION.

Regularly the Sale by a Stranger in Market Overt, bindeth an Infant, a Feme Covert, that hath Right, either in her own Right, or as Executor, or Administrator, *Idiots, Non Compos Mentis*, Men beyond Sea, and in Prison, that right have to the same.

Coke in his Exposition of the Stat. of 31 El.c.12. f. 713.

VII. QUERY.

Whether a Stranger may tender Money in performance of a Condition, to save the Estate of an Idiot ?

D

SOLU-

SOLUTION.

If an Heir be an Idiot, of what Age soever, any Man make the Tender for him, in respect of the absolute disability; and the Law in this Case is grounded on Charity: And so in like Cases.

Coke in his Comment on Littleton, § 334. f. 206. b.

But note, It is otherwise in the Case of an Infant; for it has been adjudged, *Trin. 27 El.* That where one tendred Money upon a Mortgage for an Infant, who was not Guardian, nor was to have any Interest in the Land, that it was adjudged a void Tender. *Vide Co. Litt. f. 206. b.*

VIII. QUERY.

If an Idiot, or Natural Fool, should make his Testament wisely, and reasonably to the shew, whether this Testament of his be good, or not?

SOLUTION.

If an Idiot, or Natural Fool, should make his Testament so well and wisely (in Apparence), that the same may seem rather to be made by a reasonable Man, than by one void of Discretion:

* *Ita fuisse decisum in Senatu Romano Commemorant Jo. And. & And. Barba cum aliis in c. ad nostram de consuetud. extra.*

some have been of Opinion, that such a Testament is good, and available in Law *; because Almighty

God doth sometimes so illuminate the Minds of the Foolish, that for that present, in that Case, they are not much

much inferiour to the Wise. And to this purpose, divers credible Writers do remember a merry Accident ; which (if they say truly) was no Fable, but an undoubted Fact * ; and this it is :

* *Jd. And. panor. Barba & alii in C. ad nostram Hyero Franc. in L. Furiosi de Reg. Jur. D. Boer. decif. 13. n. 58.*

At *Paris*, one Morning, a hungry poor Man, begging his Alms from Door to Door, did at the last espy very good Cheer, at a Cook's House ; whereat, by and by, his Teeth began to water, and the Spur of his empty and eager Stomach pricking him forwards, he made as much haste towards the place, as his feeble Feet would give him leave ; where he was no sooner come, but the pleasant Smell, partly of the Meat, and partly of the Sauce, did catch such sure hold of the poor Man's Nose, that (as if he had been fast holden with a Pair of Pincers) he had no power to pass from thence, until he had (to stay the Fury of his raging Appetite) eaten a piece of Bread, which he had of Charity gotten in another place : In the eating whereof his Sense was so delighted with the fresh Smell of the Cook's Cates, that albeit he did not lay his Lips to any Morfel thereof ; yet in the end, his Stomach was so well satisfied with only the Smell thereof, that he plainly acknowledged himself thereby to have gotten as good a Breakfast, as if he had indeed eaten his Belly-full of the best Cheer : Which when the Cook had heard, being an egregious Wrangler, and an impudent Companion, what doth he, but all hastily steps forth to the poor Fellow, lays fast Hand upon him, and in a hot Cholerick Mood, bids him pay for his Breakfast. The honest poor Man, half amazed at this strange Demand, wist not well what to say : But the Cook was so much the more fierce and earnest, by how much he perceived the good Man to be abashed at his Boldness, and did so cunningly cloak

' the Matter, that in the end the poor Man was conten-
 ' ed to refer the deciding of the Controversie, to wha-
 ' soever Person should next pass by that way, and with-
 ' out any more ado to abide his Judgment ; which thin-
 ' was no sooner concluded, but by and by cometh un-
 ' the place, a very Natural Fool, and such a notoriou-
 ' Idiot, as in all *Paris* his like was not to be found
 ' All the better for me, thought the Cook ; for more-
 ' he doubted the Sentence of a wise Man, than of a Fool
 ' Well, Sir, to this foresaid Judge they rehearsed the
 ' whole Fact, the Cook cruelly complaining, and the
 ' other patiently confessing as before : A great multitu-
 ' of People were gathered about them, no less desirou-
 ' to know what would follow, than wondering at the
 ' which had gone before. To conclude, this Natural
 ' perceiving, what Money the Cook exacted, caused the
 ' poor Man to put so much Money betwixt two Bo-
 ' lons, and to shake it up and down in the Cook's hear-
 ' ing : Which done, he did arbitrate, and award, *That*
 ' *as the poor Man was satisfied with only the Smell of the*
 ' *Cook's Meat, so the Cook should be recompensed only*
 ' *with the Noise of the poor Man's Money.* Which
 ' Judgment was so commended, that who so heard the
 ' same, thought, if *Cato*, or *Solomon*, had been there
 ' to decide the Controversie, they could not have given
 ' a more indifferent, or just Sentence.

The like Case is reported to have hapned at *Bonia* * : ' There a certain

* *And. Barba in c. ad nostram*
de consuetud. extr. n. 8.

' covetous Man lost his
 ' Purse with 21 Ducats
 ' it ; which when he could
 ' not recover with diligent Search, he raved like a Ma-
 ' niac, and in the end was ready to have hanged him-
 ' self for Sorrow. Another honest Man having found
 ' such a Purse, moved with Compassion, came and
 ' delivered the same to this covetous Person ; who never

than

‘ thanking the Bringer, fell forthwith to telling of the
 ‘ Money ; and finding but 20 Ducats therein, with
 ‘ great Greediness he exacted the odd Ducat ; which
 ‘ because the Finder denied, he is brought before the
 ‘ Magistrate, a Man of very great Wealth, but of very
 ‘ little Wit, (but such Magistrates are many times elect-
 ‘ ed, where the Matter lieth in the Mouths of the Multi-
 ‘ tude :) The one Party sweareth, That there were 21
 ‘ Ducats in the Purse which he lost. The other Party
 ‘ sweareth, That there were but 20 Ducats in the Purse
 ‘ which he found. The Magistrate, altho’ a Fool, gives
 ‘ no foolish Sentence ; for he pronounced, ‘ That the
 ‘ Purse which was found, was not that Purse which was
 ‘ lost ; and therefore condemned the covetous Person to
 ‘ restore the 20 Ducats to the other Party.

I may add hereunto a third Story of one, that being a
 Natural Fool, discovered a
 Conspiracy ; and it is thus :

‘ Guy Earl of *Burgogne*,
 ‘ who had taken to Wife
 ‘ *Alix*, Daughter to Duke

Daniel's History, p. 29, 30. in
vita W. I. Edit. 1634. & Sir
John Heyward's History of W. I.
 p. 14, 15. *Edit. 1613.*

‘ *Richard* the Second, and Aunt to *William* Duke of
 ‘ *Normandy*, conspired with *Nicellus*, President of *Con-*
 ‘ *stantine*, *Ranulph* Viscount of *Bayon*, *Raimond*, and
 ‘ divers others, suddenly to surprize the Duke, and slay
 ‘ him in the Night. A certain Fool (nothing regarded
 ‘ for his want of Wit) observing their Preparations, se-
 ‘ cretly got away, and in the Dead of the Night came to
 ‘ *Valogne*, where the Duke then lay ; no less slenderly
 ‘ guarded with Men, than the Place it self was slight for
 ‘ Defence : Here he continued rapping at the Gate, and
 ‘ crying out until it was opened, and he brought to the
 ‘ Presence of the Duke ; to whom he declared the Con-
 ‘ spiracy, with Circumstances of such Moment, that the
 ‘ Duke forthwith took his Horse, and posted alone to-
 ‘ wards *Falais*, an especial Place of Strength for De-

‘ fence. Presently after his Departure, the Conspirators
 ‘ came to *Valogne*; they beset the House, they enter by
 ‘ force, they search every Corner for the Duke; and find-
 ‘ ing that the Game was start, and on foot, in hot haste
 ‘ they pursued the Chase.

By these Reasons and Examples, therefore it may be
 reasonably inferred, that if a Fool do make a wise and
 reasonable Testament, the same ought to be allowed as
 lawful.

Nevertheless this is the truer Opinion, that such a Testa-
 ment is not good; the Reason is, because a Testament

Swinburn in his *Treatise of Testaments and Last Wills*, Second
 Part, Sect. 4. p. 41. b. Edit.
 1590.

is an Act to be performed
 with Discretion and Judg-
 ment: But a Natural Fool
 by the general Presumption
 of Law, doth not under-

stand what he speaketh, tho’ he seem to speak reasonably
 no more than did *Balaam’s* Ass, when he reasoned
 with his Master, or doth a Parrot speaking to the Passen-
 gers. And altho’ Almighty God does sometimes so illu-
 minate the Minds of very Natural Fools and Idiots, that
 they do well perceive, and understand what they speak
 yet because this thing hapneth but very seldom, the Law
 doth not presume the same by occasion of Words only.
 And therefore, unless further Proof made thereof, by other
 Circumstances, the Law doth not approve such Testa-
 ments.

Indeed, if it may appear by sufficient Conjectures, that
 they had the Use of Reason, or Understanding, at such
 time as they did make their Testaments, then doth the former
 Opinion take place. *Decius in L. Furiosi, C. qui Testa-
 sta. fac. poss. & in L. in negotiis Reg. Jur. F.*

IX. QUERY.

If an Idiot above the Age of 21 Years, makes a Feoffment in Fee of his Inheritance, how, and in what manner this Feoffment may be avoided, during his Life?

SOLUTION.

If it be found by Office at the King's Suit, that he was Idiot *a Nativitate*, and that he aliened his Lands, then upon a *Scire facias* against the Alience, the Land

Co. lib. 4. f. 124. a. 127. Beverley's Case.

shall be seized into the King's Hands, and thereby the Inheritance shall be re-vested in the Idiot. 18 E. 3. *Scire Facias* 10. 32 E. 3. *Scire Facias* 106. 50. *Ass. Pl. 2.* For the Statute of *Prærogativa Regis* saith, *Quod post mortem eorum reddat eam rectis Hæredibus*; which the King cannot do, nor can the King have the possession of the Land to his own use, if not that by the Office and Seizure, such Conveyance made by the Idiot be destroyed, and that doth not im-

pugn the Maxim at the Common Law *: For in this Case the Idiot in no Plea that he can plead, shall disable, or stultifie himself; but all is found by Office by the Inquisition, and Ver-

* It is a Maxim of the Common Law of England, That the Party shall not disable himself, *Co. Lit. 247. b. 10 Lib. 4. f. 123. b. Beverley's Case, Cro El. f. 398. Stroud v. Marshal. Co. 3. Inst. 215. Littleton, sect. 405.*

dict of twelve Men, at the King's Suit, who are not concluded to speak the Truth; and such Office when it is found, shall have relation *a tempore Nativitatis*, to avoid all mean Acts made by the Idiot, as Feoffments, Releases, &c. And therewith agreeth 23 E. 3. *Scire Fa-*

cias 106. *Stamford's Prærogative* 34. *F. N. B.* 202. *C.* But notwithstanding the Words of the Statute of *Prærog. Regis* are general, and emphatical, *Nullatenus alienantur*; yet if he Alien by Fine, or Recovery, it shall bind him, or acknowledge a Statute or Recognisance, neither his Heirs, nor his Executors, shall avoid it; for these are Matters of Record, which shall not be avoided by a bare Averment of *Non Compos Mentis*, for the Inconvenience which may follow thereupon. Also such Averment is against the Office and Dignity of the Judge, for he ought not to take any Conusance of a Fine, or Recognisance of him who is *Non Compos Mentis*. 18 *E. 2. Fines* 120. 17. *Ass. Pl.* 17. 17 *E. 3.*

X. QUERY.

A Fine levied by an Idiot, or Natural Fool, what it operates?

SOLUTION.

Anno 23 *Elix.* In the Court of Wards, the Case was this: That *Henry Bushley* seized in Fee of certain Lands in *North-Mins*, in the County of *Hertford*, by his Will, in Writing, demised the said Lands to *Henry Bushley*, his Son, in Tail; the Remainder to one *William Bushley*.

And for this, that his Son was within Age, he demised the Education of him to *Thomas Harrison*, whom he made his Executor. And afterwards it hapned, that *Henry* the Son became a monstrous and deformed Cripple, and proved an *Idiot, a Nativitate*: The which Idiot, by the Practice of one *Nichols*, and others, was ravished and taken out of the Custody of his Guardian, and was carried

carried upon Mens Shoulders to a Place unknown, and there kept in secret, until he had acknowledged a Fine of his Lands to one *Botham*, before Justice *Southcot*, Anno 9 *Eliz.* And by Indenture between them, the use of the said Fine was declared to the use of the Cognizee, and his Heirs ; which *Botham* conveyed, Anno 12 *Eliz.* the said Land to one *Henry Mansfield*. And Anno 12 *Eliz.* the said *Henry Bushley*, the Son, by Inquisition, was found an *Idiot a Nativitate* ; and upon this in Anno 33. the Court of Wards took Order for the Possession of the said Lands.

And it was moved, as a Doubt in the said Court of Wards, Whether the said Fine should be to the Use of the said Idiot, and his Heirs ? For notwithstanding that the Fine, which is of Record, binds the Idiot for the Causes aforesaid, yet the Indentures are not sufficient to direct the Uses. But it was resolved, that forasmuch as he was enabled by the Fine, as to the Principal, he shall not be disabled to limit the Uses, which are but as accessory.

Vide Co. Lib. 2. f 58. Beckwith's Case, & Co. lib. 10. Portington's Case.

And the same is the Law of an Infant, and Feme Covert. And the said *Mansfield* brought an Action of Trespass in the Common Pleas, against one *Trot*, the Farmer of the said Lands, and the Issue was to be tried at the Bar : And the said deformed Idiot was sent out of the Court of Wards, to be shewn to the Judges of the Common Pleas, and to the Jurors there tried and sworn ; and being brought upon a Man's Shoulders, the Judges hearing, that the Title of *Mansfield* was under the said Fine levied by that Idiot, the Lord *Dyer*, and the Court, by Consent of Parties, caused a Juror to be withdrawn ; and the Lord *Dyer* said, That the Judge who took the Fine, was never worthy to take another : But notwithstanding this, and altho' the monstrous Deformity, and

Idiocy

Idiocy, of *Bushley*, was apparent and visible, yet the Fine stood good.

XI. QUERY.

A Fine levied by J. S. Uncle of an Idiot, who was seized of the Inheritance, (the said J. S. dying in the Life of H. the Idiot), whether this Fine so levied, can bar the Grand-child of J. S. ?

SOLUTION.

Trespass upon *Not Guilty*, and a special Verdict, the Case was, Tenant for Life, Reversion to *William Rogers*, an Idiot in Fee; *Andrew Rogers*, his Uncle, levies a Fine, *Come Ceo*, &c. with Proclamation to *Robert Crompton*; and had Issue *John*, who had Issue *William* the Defendant, and died. *William* the Idiot died without Issue; *William* the Defendant enters as Heir unto him, viz. Son and Heir of *John*, Son and Heir of the said *Andrew*; And whether he may claim against this Fine of his Grand-father (not claiming by the Grand-father, but deriving only his Pedigree from him) was the Question? And it was argued by *Rolls* for the Plaintiff, That forasmuch as *William Rogers* is Heir to *Andrew* his Grand-father, Uncle to the said *William* the Idiot, he is estopped to claim against this Fine, or to say, *Quod partes ad finem nihil habuerunt*. And for Proof thereof, he relied upon the Statute of 27 E. 1. of Fines, Co. lib. 3. f. 89. 10 Car. *Scovel & Brastock's Case*, Co lib. 3. f. 30. *Sir George Brown's Case*, & *Saule & Clerk's Case*. But it was argued by *Farrer* for the Defendant, that this Fine shall not bar, because he claims not any Interest by, or from *Andrew*, nor as Heir unto him, but only makes mention

mention of him in the Pedigree, *Co. Litt. f. 8. 2 E. 3. 6. Co. lib. 8. 53. Symms Case, &c.* And that here he is in, *Quasi*, of another Title, and *Puisny* to the Fine. *Berkly*, and *Croke*, delivered their Opinions, That this Fine by *Andrew*, the Uncle of *William* the Idiot, who was seized of the Inheritance (he dying in the Life of *William*, so as nothing ever attached upon him) shall never bar *William* the Defendant, who was Grand-child of the said *Andrew*, because he claims nothing by, or from him; but only from *William* the Nephew of *Andrew*, who survived the said *Andrew*: And he makes his Title as Heir to the said *William*, the Nephew who was last seized, not making therein any mention of *Andrew*, as of one from whom he claims, but only as drawing his Descent from him by way of Pedigree, and not by way of Title; and therefore it was compared to *Hobbes Case, Litt. fol.* where the Father is attainted of Felony, having Issue two Sons; and the one of them purchaseth Lands, and dies without Issue, it shall not bar the other Son to claim, as Heir to his Brother: And the Corruption of Blood in the Father shall not hurt him. And *Berkley* compared it to the Case, 10 *Eliz. Dyer* 274. where there were two Brothers; the Eldest hath good Cause *del petition de droit*; the Youngest hath Issue a Son, and is attainted of Felony, and executed: The Eldest Son dieth without Issue; the Issue of the Younger Brother is barred of the Petition, because his Blood is corrupt, and he cannot claim, but by mentioning his Father, and from him, &c. But here, forasmuch as he doth not claim, nor derive by him who levied the Fine; they held, he should not be barred by the Fine.

XII. QUERY.

Whether the Custody of an Idiot holding by Copy of Court-Roll, belongs to the King by his Prerogative, or to the Lord of the Copy-hold Mannor ?

SOLUTION.

Co. Lib. 4. f. 127. b.

The King, (say the Judges in *Beverley's Case*) shall not

have the Custody of the Lands of an Idiot holden by Copy ; for the same is but an Estate at Will by the Common Law : And if the King should have the Custody thereof, it would be mischievous to the Lord of the Mannor ; but yet, an Alienation made by an Idiot of his Copyhold-Land, after Office found, shall be avoided. *Vide 11 El. Dyer 302.*

It is a Rule in the Court of Wards, That if an Idiot has not any Goods or Chattels, or Lands, but Copyhold-Lands, held of a common Person, the King shall not have the Custody, but the Lord of whom the Copyhold is holden ; but if he has any other Land, then the Copyhold-Land also.

Pasch. 13 Eliz. John Rogers's Case, C. W. f. 74.

In the Court of Wards it was clearly agreed by the Council of that Court, That a Copyholder, who is an Idiot, ought not to be ordered in this Court for his Copyhold, but shall be done in the Court of the Lord of the Mannor.

13 & 14 El. Dyer 302. b. 303. a. 2 H. 7. 3. Noy 27.

Sheppard in his *Court-Keeper's Guide*, tells us, That the Lord shall retain the Copyhold-Land of the Idiot, or Lunatick, till he come to himself.

Cap. 19. p. 119. *The Fourth Edit.* 1656.

Note, One Sir Edward Champernon being Committee of a Ward, who had a Mannor wherein were divers Copyholders, amongst whom one was *Mutus*, & *Surdus*, granted the Custody of that Copyhold-Land to another, who entred; the *Prochein Amie* of the Copyholder entred; And which of

Concerning such as are deaf and dumb. See *Bracton*, lib. 5. tract. 5. cap. 20. n. 2. f. 421. a. *Fleta* l. 6. c. 40. nu. 2. *Instit.* 2. 12. 3. D. 28. 1. 6. 1. *Swinburn* 2d Part, § 10. Cod. 6. 22. 10.

them should have the Custody? Or, If none of them? was the Question. And it was resolved, That the Lord should have the Custody; for otherwise he should be prejudiced in his Rents and Services; and his Grant was Good: Wherefore it was adjudged for the Grantee. *Gro. Jac. f. 105. Eavers v. Skinner. C.*

XIII. QUERY.

Whether there be any Difference between an Estate made, or conveyed in Person, or by Attorney, as to an Idiot, or any other Non compos mentis.

SOLUTION.

There is a diversity taken in the Books of Law, between an Estate made, or conveyed in Person, and by Attorney: For if an Idiot, or other *Non compos mentis*,

Co. l. 4. f. 125. Beverley's Case of Non compos mentis.

makes a Feoffment in Fee, in *propria persona*, and dieth, his Heir within Age, he shall not be in Ward; or if he dieth

dieth without Heir, the Land shall not Escheat ; but if the Feoffment be made by Letter of Attorney, altho' he shall not avoid the same ; yet after his Death, as to all others in Judgment of Law, the Estate was void, and therefore in such Case, if his Heir be within Age, he shall be in Ward ; or if he dieth without Heir, the Land shall Escheat. And likewise, in the Case of an Infant, if he maketh a Feoffment in Person, if he dieth without Heir, the Land shall not Escheat ; but otherwise, if it were made by Letter of Attorney ; but the Infant himself shall not avoid it, but others shall : But things done by matter of Record, as Fines, Recoveries, Judgments, Statutes, Recognisances, shall bind as well the Idiot, as he who is *Non compos mentis*, 31 E. 3. *Saver Default* 371. 1 Mar. *Dum fuit infra ætatem* 7.

A Grant of an Infant, (saith *Finch*) under the Age of 21 Years, and one out of his right Mind (whom we call, *Non sane memorie*, or *Non compos mentis*) as an

Lib. 2. c. 2. of Possessions, p. 102, 103. Edit. 1627.

Idiot may be avoided at any time, by Entry, Action, &c. or a Feoffment by Letter of Attorney, &c. if they deliver it with their Hands, as in a Feoffment, and themselves make Livery, or a Gift of Goods, and themselves deliver them ; but if they deliver not with their Hand, as in a Grant of a Rent, Advowson, &c. it is meerly void, and nothing at all passeth, so as they may have a Trespass, or Assize, and remain Tenant to the Lord, and therefore shall be in Ward, notwithstanding such Feoffment.

XIV. QUERY.

A Man dies seised of Land, his Heir being an Idiot, or Sot Natural, and before Office he levies a Fine, whether the King shall have the Lands, per Prærogativam Regis, cap. 9. or not?

SOLUTION.

Home devie seisi de Terre, son Heire esteant sotte natural, & avant Office il leva fine, le Roy n'avera les terres per Prærogativam Regis, cap. 9. Car ne serra intende que fuit sotte Conuter le Fine.

Crompton, fol. 117. a. tit. Court de Gards & Liveries, Edit. 1594.

Car ceo va encounter le credit del Justice que prist le fine, car serra intend que le Justice ne voile prender fine de luy, si ust este Ideot. Englished thus: A Man seized of Land, his Heir being an Idiot, and before any Office, this Idiot levieth a Fine, the King shall not have the Custody of the Lands by his Prærogative; for that it shall not be intended, or presumed, that he was a Natural Fool against the Fine levied; because this will impeach the Reputation, or Credit, of the Judge, before whom the Caption of the Fine was: For it shall be presumed, that the Judge would not take the Fine, if he had not been an Idiot.

XV. QUERY.

Idiots in the Custody of the Prince, whether the Custody of an Idiot can be devised by the Testator?

SOLU-

SOLUTION.

Concerning Idiots, such is the Prerogative of the Princes of this Land, that they shall have the Custody of all

Swinburn in his Treatise of Testaments and Last Wills, 3. Part, § 11. nu. 13. p. 99. a. b. Edit. 1590.

the Lands of Natural Fools, and may take the Profits thereof without waste, or destruction, of whose Fee soever the same be holden, finding to them Necessaries; and after the Death of such Idiots, the Land must be restored to the right Heirs: But in the mean time; that is to say, during the Life of the Idiot, the Tuition of the Idiot, or of his Lands, cannot be devised by Testament to any other Person, contrary to the Course of the Common Law, in prejudice of him to whom the Wardship doth belong, saving the Testator may commit the Custody of such Goods and Chattels as he

doth bequeath to the Idiot, to whom he will, and during so long time as he will *.

* Si quidem unusquisque potest rebus suis quam velit legem imponere. Mautic, l. 7. tit. 1. nu. 38. Et Testatoris voluntas habetur pro lege L. Servus de manumiss. licet alias videatur per Fitzherbert's Nat. Br. de Idiota inquirendo quod bona quæ Idiotæ obvenirent, suo Gardiano accrescunt. Quære tamen per Stamford super Prærogativam Regis, c. Idiot C.

XVI. QUERY.

Idiocy, whether in any Case triable in the Ecclesiastical Court?

SOLUTION.

Mich. 15 Jac. B. R. Inter Percher & Wheeble, per Curiam & Dr. Godolphin in his Repertorium Canonicum, c. 11. p. 120. § 17.

If an Administrator sue for a Legacy due to the Deceased in the Ecclesiastical Court, and the Defendant plead

plead the Release of the Deceased, and the Plaintiff avoid it, for that the Deceased was an Idiot; that Idiocy shall be tried there, and no Prohibition shall be granted, for that they have Jurisdiction of the Original Matter; and that according to the old Rule, to be found in the Register, and in the Books of Law, *Non est consonum Rationi, quod cognitio accessorii in Curia Christianitatis impediatur, ubi cognitio causæ principalis ad forum Ecclesiasticum noscitur pertinere.* Register Orig. f. 58. a. Co. 2 Inst. f. 493. Cro. Jac. f. 269. Roberts Case, Cro. Car. Netter v. Bret. Cro. Jac. f. 348. Egerton v. Egerton. 12 Co. f. 65. Tit. Court Ecclesiastical, C. Bulstrode's Reports, Second Part, f. 210, 211. Egerton v. Egerton.

Cujus Juris, (i. e. Jurisdictionis) est principale, ejusdem Juris erit accessorium.

XVII. QUERY.

An Executor having obtained Judgment in an Accompt, and having the Defendant in Execution for Arrerages, and the Testament being afterwards annulled for Idiocy in the Testator, whether the Testament being disapproved, an Audita Querela will lie for the Defendant?

SOLUTION.

Anno 35 H. 8. in the Exchequer Chamber a Case was well debated by the Justices of both Benches, which was such: One Moyer, who was Executor of the Testament of John Gisfords, sued a Writ of Account against one Carvanel, as Receiver of the Money of the said Gisfords; the Defendant pleads, *Ne unques Receiver pur Accompt*
E render

3 & 4 Eliz. Dyer, f. 203. b.
204. a Co. lib. 8. f. 144. Drury's Case.

render : And it was found for the Plaintiff, and Judgment given, that he should account ; and upon this a *Capias ad Computandum* was awarded : Whereupon the Defendant came in, and Accounts in Ward, and he was found in Arrerages, and his Body was committed to Prison for Execution. And after the said Testament was annulled, by Sentence in the Spiritual Court ; for that the said *John Gisors*, the Testator was an Idiot from his Birth, and this Record Spiritual is certified into the Chancery by Writ, and thence sent into the King's Bench, where the Action of Account was brought. And the said *Carvanel* sued forth an *Audita Querela* in the same Court, containing this Matter in his Writ, and a *Venire Facias* against *Moyer*, who demurred in Law upon the whole Matter : And it was resolved, that the *Audita Querela* did lie, because the Will was disapproved and annulled.

XVIII. QUERY.

Whether an Attornment made to a Grant by an Idiot, or other, Non compos mentis, can be good in Law?

SOLUTION.

A Man that is an Idiot, or other *Non compos mentis*, cannot Attorn : For he who is [*Aments*,] without Understanding, cannot make an Attornment, which is an Agreement : And yet if a Man *Non compos mentis*, be Lessee for Years, rendering Rent, and the Lessee ejecteth him and maketh a Feoffment, and afterwards the *Non compos mentis* re-enteth ; this Act of Re-entry doth subject himself to Distress, and an Action of Waste, altho' he cannot make an express Attornment. *Coke* in his Comment on *Littleton*, sect. 566. f. 315. a. 6 Co. 69. a. *Sir Moyle Finch's Case*. 32 E. 3. Age 80. 18 E 3. 35.

XIX. QUERY.

Whether an Inquisition shall bind an Idiot, without an Examination by the Council ?

SOLUTION.

It was said by *Dyer* in the Case of one *Brent*, that the Law is, Altho' a Man be found an Idiot by Inquisition, yet he ought to be examined by the Counsel, and affirmed by them to be an Idiot, or otherwise he shall not be bound by the Inquisition. And he said further, That *Brent* was found an Idiot by Inquisition ; and after being examined by the Lords of the Star-Chamber, he was adjudged to be no Idiot ; whereupon he was delivered from the Thralldom of Idiocy.

Dallison's Rep. pl. 19. f. 95.

XX. QUERY.

No Possessions in Lands descending to an Idiot, but only a Right, whether the King can enter, and have the Custody of it ?

SOLUTION.

If there descend to an Idiot no Possession in Lands, but only a Right, be it Right of Entry, or Title of Entry, or Right of Action, the King shall not enter, and have the Custody of the same, 1 *H. 7. 15. Stamford Super Prærog. Regis, c. 9. f. 35. b. Edit. 1567.*

Hitherto of the Description, Remarks, and Queries, relating to an Idiot, or Sot Natural : I proceed now to speak of the Furor Man, that is totally bereft of his Wits.

P A R T the Second.

Of him who is by Accident wholly deprived of his Wits.

S E C T. I.

This sort of Non Compos Mentis how described.

HE is said to be one, that was of good and sound Memory, and by the Visitation of God, through some Sickness, Grief, or other Accident, utterly loseth his Memory, and Understanding; and so falls into some high, or low degree of Fury or Madness. *Co. Litt. f. 247. a. & 4 Co. f. 124. b. Beverley's Case of Non compos mentis.*

Furor est continuata mentis Alienatio, qua quis omni intellectu caret, D. 1. 18. 14. & Gothofredus ad Lor.

S E C T. II.

The Remarks concerning Mad., or Distracted Persons.

I. R E M A R K.

THE true Account of the Cause of Distraction is this:

When the Animal Spirits, by some Accident or other, are so over-heated, that they become unserviceable to cold and sedate Reasoning; and then Reason being thus laid aside, Fancy

Dr. Goodman's Treatise, entitled, The Penitent pardoned, under the Parable of the Prodigal, Part I. c. 5. p. 123, 124.

gets the Ascendent, and *Phaeton*-like, drives on furiously, and inconsistently. This Combustion of the Spirits happens, sometimes by over-great Intention of the Mind, in long and constant Study; sometimes by a Fever, which inflaming the Blood, that communicates the *Incendium* to the Spirits, which take the Original from it: But most usually by the Rage and Violence of some of the Passions, (whether Irascible, or Concupiscible, as they are wont to be distinguish-

ed) a Man setting his Heart vehemently upon some

* Object or other, the Spirits are set on fire, by the Violence of their own Motion; and in that Rage are not to be governed by

* *Mad-men have always before their Eyes, those Idea's and Shapes which work the Apprehension of their Fury, and hold them in the Vision and inward View of that which most troubleth their diseased Brain. French Academy, c. 18. Of Intemperance.*

Reason. This we have sad Examples of, in Love, in Grief, in Jealousie, in Wrath, and Vexation; and indeed, (saith my Author) *Bethlehem* is filled with the Instances.

I. R E M A R K.

By the Statute of *Prærogativa Regis*, the King of
 17 E. 2. c. 10. England is to provide, that
 the Lands of the Furor Men

be safely kept, without waste ; and that they, and their Families, (if they have any) shall be maintained with the Profits thereof ; and that the Residue be kept for their use, and delivered unto them, when they come to be of right Mind : So as their Land shall not be aliened, neither shall the King have any Profit thereof to his own use : But if they die in such Estate, the Residue shall be distributed for their Souls, by the Advice of the Ordinary.

III. R E M A R K.

The words of *F. N. B.* 232. That the King is bound
 of Right, by his Laws, to
 4 Co. 128. *Beverley's Case* of defend his Subjects, and
 Non compos mentis. their Goods, and Chattels,
 Lands, and Tenements, ex-

tend as well to one *Non compos Mentis*, as a Mad-man, as to an Idiot *a Nativitate* ; but in Case of *Non compos mentis*, the King shall not have Interest in a Mad-man, that is wholly deprived of his Understanding, as he hath in the Idiot ; because that a distracted Man may recover his Memory that he hath lost ; and therefore, in the Case of the Idiot, or Fool Natural, the Law saith, *Rex habebit Custodiam* ; but in the Case of a Mad-man, or *Non compos mentis*, *Rex providebit*. And as to Alienation made by a Man distracted, the words are all one, as they are in the Case of the Idiot ; and therefore, after Office found thereof, the Alienation, Gift, &c. of him who is by Accident deprived of his Wits, are in equal Case with the Alienation, or Gift of an Idiot *a Nativitate*. And
 the

the said words of the Writ, in the Register, *Quia accepimus quod J. de B. fatuus &*

Idiota existit, &c. extend

as well to another Non com-

pos mentis, as *Idiota a nati-*

vitate, a Fool Natural : For afterwards, in the same

Writ it is said, *Diligenter inquiras, si Idem fatuus &*

Idiota, sit necne, & si sit,

tum utrum a natiuitate sua,

an ab alio tempore, tunc a

quo tempore & qualiter, & quomodo, & si lucidis gau-

deat intervallis, & si Idem J. in eodem statu existens

terras, aut Tenementa aliqua alienavit necne, &c. So

that it appeareth, that in Judgment of Law, *Fatuus, &*

Idiota, include as well Non compos mentis, as *Idiota a*

Natiuitate ; and therefore they are in the same Case, as

to the Alienation of their Lands, and Tenements, Goods,

and Chattels.

Register of Original and Ju-
dicial Writs, f. 266. a.

Register, f. 2668.

IV. R E M A R K.

A Furor Man cannot appoint an Attorney, as appears by Britton ; for he tells us, *Chescun ne puit mye faire at-*

torne. Car enfant dedens

Age, ne muet, ne surd, ne

fol naistre ne homme ar-

rage, ou auterment sans discretion, ne puit mye faire

attornes.

Cap. 126. f. 285. b.

V. R E M A R K.

There is required in them who contract Matrimony, a sound and whole Mind to consent; and therefore, he that

Furor, says the Lawyer *Gaius*.
*Sponsalibus impedimento sit, plus
 quam manifestum est. D. 23. 1. 8.*
*Furor contrahi Matrimonium non
 finit, quia consensu opus est, says
 Paulus, D. 23. 2. 16. 2.*

*Furiosus Matrimonium contra-
 here non potest. Decret. Greg. l. 4.
 tit. 1. c. 24. Innocentius 3.
 Versil. Episcopa. dilectus filius R.
 proposuit, quod filiam suam cui-
 dam Matrimonialiter copulavit.
 Cum autem eadem mulier, cum
 ipso viro, qui continuo furore la-
 borat, morari non possit, & pro-
 pter alienationem mentis non po-
 tuerit intervenire consensus: man-
 damus, quatenus si rem noveris
 ita esse, præfatas personas cures
 ab invicem separare.*

c. 35. Question 4. nu. 24, 25. p. 201. Engl. Edit. 1643.
 Such one may not consent to Marriage, and his Issue
 will not be legitimate. *Trin. 3 Jac. B. Regis. Stiles.*

VI. R E M A R K.

Tho' Furor, or Madness, hinders the contracting of
 Matrimony, yet it shall not
 take away that Marriage
 that is already contracted,
 as appears by the Civil and

*Furor impedit Matrimonium
 contrahendum, sed non dirimit con-
 tractum.*

Canon Laws, *D. 23. 1. 8. D. 23. 2. 16. 2. Instit. Ju-
 ris Canonici Lib. 2. Tit. 12. Arnoldus Corvinus, in his
 Jus Canonicum, Lib. 2. Tit. 13. de Nuptiis.*

VII. REMARK.

A Furor Man ought not to be a Witness in any Cause, be it either Civil, or Criminal, *Decret. 2. a. Pars caus. 3. Qu. 19. c. 14. Decret. Greg. Lib. 3. Tit. 27.*

Furiosus aut mente Captus, non potest esse Testis.

c. 3. de Successionibus ab intestato, Corvinus in his Jus Canonicum, lib. 3. tit. 27. de Testibus. Ulpianus, tit. 20. de Testamentis. D. 28. 1. 20. 4. Swinburn in his Treatise of Wills, Part 4. Sect. 21. f. 186. a. Edit. 1590.

VIII. REMARK.

Children, and Mad-men, * altho' they have not the next actual power of using things, yet they have a radical power, because they are Men: *Amesius in his Cases of Conscience, lib. 5.*

* *Lex duodecim Tabularum, furiosum, in curatione jubet esse Agnatorum. Ulpian, tit. 12. de Curatoribus.*

c. 41. qu. 1. sect. 6. And by the Law of Nations, Children are then capable of inheriting † an Estate, tho' they be justly restrained from managing of it, by reason of their immature Judgment. *Grotius de jure belli & pacis, Lib. 2. Cap. 5. Sect. 2.*

† *Plutarch de Fort. Alex. l. 2. speaking of Children saith, That Children have a Right to the Inheritance, but not to the use of it.*

IX. RE-

IX. REMARK.

Bracton in his Treatise of the Laws and Customs of England, shewing by what Persons possession of things

Furiosus sine tutoris auctoritate non potest incipere possidere : Quia affectionem tenendi non habet, licet maxime corpore suo rem contingat : Sicuti si quis dormienti aliquid in manu ponat, D. 41. 2. 1. 3.

may be acquired, says thus of the furious Man ; *Furiosus affectionem retinendi habere non poterit sine Curatore, quia non est aliud de eo, nisi ad similitudinem ejus, qui dormienti pluviam in*

manum projecerit. Et qui accipere debet, & retinere, oportet quod habeat affectionem, & intellectum percipiendi, & retinendi. Item qui curare debet, & Custodiam habere, oportet eodem modo quod habeat Intellectus, quia si furiosum miseris ut possideas, nequaquam per eos videaris possessionem apprehendisse, quia intellectum non habet.

X. REMARK.

He that is a Mad-man, is incapable to be a Judge, or an Arbitrator, for want of

Non omnes Judices dari possunt, qui Judicis dandi jus habent : Quidam enim Lege impediuntur ne Judices sint, quidam natura ; quidam moribus, natura ; ut surdus, mutus, & perpetuo furiosus, & impubes, quia judicio carent, D. 5. 1. 12. 2.

Understanding and Discretion. *Mirror of Justices, c. 2. sect. 2. p. 116. West. Symb. part 2. sect. 23, 26, 27. Neither can be an Essoiner, or Excusator. Mirror, c. 2. sect. 30. p. 175.*

XI. REMARK.

One that is a Mad-man, cannot Attorn ; for that he that hath no Understanding, cannot agree to the Grant. 18 E. 3. 53. 6 Co. f. 69. a. Sir Moyle Finch's Case.

XII.

XII. REMARK.

To a lawful Contract there are required Persons fit to contract : Hence Mad-men

are not fit to make Contracts, or Alienations ; and under that Title, by the Civil Law of all Countries, are deservedly accounted Nullities.

Amesius, l. 5. c. 42.

qu. 1. of Contracts, D. 39.

5. 23 1. Cowel's Institutes

lib. 2. tit. 8. n. 3. p. 108.

F. N. B. f. 292. C. Fleta

lib. 3. c. 3. n. 10. p. 178,

& lib. 2. c. 56. nu. 19.

p. 122. Bracton, lib. 3. tract.

1. c. 2. n. 8. f. 100. A.

& lib. 5. tract. 5. c. 20. nu. 1. de Exceptionibus.

Fleta, lib. 6. c. 40. nu. 1. p. 434. Cowel, lib. 3. tit.

20. nu. 7. p. 161. Fleta, lib. 2. c. 60. nu. 26. Cowel,

lib. 2. tit. 7. nu. 4. de Donatibus. Britton, c. 28. f. 62. b.

63. a. & c. 34. f. 90. a. Mirror de Justices, c. 2. sect.

27. p. 161.

Note, That every Alienation of a Man's Right, all Contracts betwixt Man and Man, all Leagues, &c. betwixt Princes, ought to be done with sound Judgment ; therefore the Acts of the Will, that are express'd with overt signs, are to be understood, the Acts of a Mind endued with Reason, of which a Man distracted is wholly deprived, and therefore incapable of performing any profitable things ; which made King Achish say to his Servants, Lo, you see the Man is mad ; Wherefore then have ye brought him to me ?

1 Sam. 21. 13, 14, 15.

XIII. REMARK.

In all Conveyance, or Purchase for Joynture, unless it be by Fine, or Common Recovery, he which makes the Estate, must be a Person able to convey, &c. at the time of the Joynture making ; or else it is not good.

He must not therefore be Attaint of Treason, an Alien born, under Age, or *Non compos mentis*, a Mad-man. *The Woman's Lawyer, lib, 3. c. 31. p. 188.*

XIV. REMARK.

It is a good Exception for the Person of him, that complaineth, or bringeth any Action, to say, he is *Furiosus*, a Mad-man, because such a one differeth not much from a Beast, that wants Reason, *Lib. 5. tract. 5. c. 20. in. 1. f. 420. b. Fleta, lib. 6. cap. 38. nu. 1. Stamford Super Prærogativam Regis, cap. 10. fol. 36. b. Edit. 1567.*

XV. REMARK.

He that promiseth, should be endued with Reason, which renders the Promises of Mad-men void, and of

Promissio requirit usum Rationis in promittente; ideo furiosi nulla est promissio.

no force, *Grotius de jure belli & pacis, lib. 2. c. 11. sect. 5.* And it is the same

Law in case of Oaths made

by Men distracted: For they that swear, should be of sound Mind, and should use

Animus rationis compos & deliberatus.

great deliberation, before they take any Oaths. *Idem, lib. 2. c. 13. sect. 2.*

Sheppard in his *Abridgment, tit. Idiots and Lunaticks*, tells us, That a Mad-man cannot promise, or contract for any thing to bind himself.

XVI. REMARK.

A Copyholder of unsound Memory, as a Furor Man, cannot make a Forfeiture of his Estate. *Sheppard's Court-Keeper's Guide, cap. 22.*

XVII. RE-

XVII. R E M A R K.

Any Man may be a Steward of a Copyhold Mannor ; and therefore, if an Infant, Lunatick, or *Non compos mentis*, a Man distracted, be made Steward ; all Acts that he doth, according to his Office, are good. *Sheppard's Court-Keeper's Guide*, cap. 19. p. 115.

XVIII. R E M A R K.

Every Deed, Feeoffment, or Grant, which a Furor-man makes, is avoidable, and yet shall never be avoided by himself ; because 'tis a Maxim in Law, That no Man of full Age, shall, by any Plea, pleaded by him, be received, to disable his own Person, or stultifie himself : Besides, another Reason is rendred, *sc.* Because that when he recovers his Memory, he cannot know what he did when he was *Non compos mentis*. 4 Co. 124. b. *Beverley's Case*. *Littleton*, sect. 405. *Noy* in his Treatise of the Grounds of the Laws of this Nation, cap. 28. Of Conveyances.

XIX. R E M A R K.

Altho' Mad-men themselves cannot be received to disable themselves, yet twelve Men, upon their Oaths, may find the Truth of the Matter, in the Case of a Feeoffment, or other Transact in *Pais* : But if Mad-men alien by Fine, or Recovery, this shall not only bind themselves, but their Heirs also. Co. Litt. f. 247. a. 4 Co. 124. a. *Beverley's Case* of *Non compos mentis*. *Perkins*, sect. 24.

XX. R E M A R K.

There are in our Books of Law found four several Opinions, concerning the Alienation, or other Act of a Man *Non compos mentis*; &c. For First, Some are of Opinion, That he may avoid his own Act, by Entry, or Plea.

Coke in his Comment on Littleton, § 405. f. 247. a. b.

Secondly, Others are of Opinion, That he may avoid it by Writ, and not by Plea.

Thirdly, Others, That he may avoid it, either by Plea, or Writ; and of this Opinion is *Fitzherbert*, in his *Natura Brevium*.

Fourthly, *Littleton*, sect. 405. is of Opinion, That neither by Plea, nor by Writ, nor otherwise, he himself shall avoid it, but his Heir, in respect his Ancestor was *Non compos mentis*, shall avoid it by Entry, Plea, or Writ: And therewith the greatest Authorities of the Law-Books agree; and so it was resolved with Master *Little-*

4 Co. f. 126, 127.

ton, in *Beverley's Case*, where it is said, That it is a Maxim of the Common

Law, *That the Party shall not disable himself*.

XXI. R E M A R K.

If a Furor Man, or a Man of *Non sane Memorie*, make a Feoffment, &c. he himself cannot enter, nor have a Writ, *Dum non fuit compos mentis*; but after his Death, his Heir may well enter, or have the said Writ of, *Dum non fuit compos mentis*, at his Choice. *Littleton*, sect. 406. *Exposition of Terms of the Law*, f. 138. a. b. tit. *Dum non fuit compos mentis*. *Natura Brevium*, f. 128. a. b. Edit. 1551.

XXII. REMARK.

Mad-folks, during the time of their Furor, or Insanity of Mind, cannot make a Testament, nor dispose any thing by Will; no, not *ad pias Causas*; the Reason is most forceable, because they know not what they do: For in making of Testaments, the Integrity and Perfectness of Mind, and not Health of the Body, is requisite; and thereupon arose that common Clause, used in every Testament almost: *Sick in Body, but of perfect Mind, and Memory.* Swinburn in his Treatise of Testaments and Last Wills, 2d Part, sect. 3. f. 34. b. Edit. 1590. Inst. 2. 12. 1. Cod. 6. 22. 9. Cod. 6. 36. 5. Cod. 6. 22. 3. Caius, lib. 2. tit. 2. de Testamentis. Ulpianus. tit. 20. de Testamentis. 6 Co. 23. Marquess of Winchester's Case.

Furiosi testamentum facere non possunt, quia mente carent. In adversa corporis valetudine mente captus tempore testamentum facere non potest. Senium etatis vel aegritudinem corporis, sinceritatem mentis tenentibus, testamenti factionem certum est non auferre.

XXIII. REMARK.

The Impediment of Furor, or Madness, is so strong, that if the Testator make his Testament after this Furor, or Madness have overtaken him, and whiles as yet it doth possess his Mind, albeit the Furor afterwards departing, or ceasing, the Testator recover his former Understanding, yet doth not the Testament made, during his former Fit, recover any force * or strength thereby.

* *Quod initio vitiosum est, non potest tractu temporis convalescere* D. 50. 17. 29. l. 178. l. 201. l. 210. 1. 80. D. 34. 7. 1. D. 44. 7. 27. non firmatur 18, de Reg. in 6. D. 49. 1. 16. nisi duo, quæ sequuntur, concurrunt vitii sc. Cessatio, & novissimus Actus, i.e. nisi principium ipsius rei utile sequatur,

verbis, vel actibus extrinsecus declaratis, veluti Rati habitione aliqua.

Cod.

Cod. 6. 22. 9. Instit. 2. 12. 1. Swinburn in his Tract of Wills, Part 2. sect. 3. nu. 3. p. 36. b. 37. a. Edit. 1590. Godolphin's Tract, entituled, The Orphan's Legacy, Part 1. cap. 8. nu. 2.

XXIV. R E M A R K.

If a Man, whilst he is mad, or in a distracted Condition, be admitted by a Judge

Note, He that is enabled to the Principal; that is, the Fine shall not be disabled to do the Accessory, that is the declaring the uses.

to levy a Fine, his Declaration of the Uses shall bind him and his Heirs, as long as the Fine remaineth in

force, 2 Co. f. 58. b. Co. lib. 12. f. 123. Mansfield's Case. 10 Co. f. 42. b. Mary Portington's Case.

XXV. R E M A R K.

If a Furor Man grant a Rent-Charge out of Land, his Heir may avoid it, and hold it discharged. Sheppard in his Abridgment. *Tit. Idiots.*

XXVI. R E M A R K.

He that is not a good Grantor, cannot make a good Grant, or Surrender of Copyhold-Land, without a special Custom to enable him thereunto: And hence it is, that a Surrender made by a Mad-man is not good, but void in Law. *Sheppard of Copyholds, c. 12. p. 117, 118.*

XXVII. R E M A R K.

A Surrender, or Grant of Copyhold-Land, may be made to a Lunatick, and to one that was of good and found

found Memory, and by the Visitation hath lost it. *Shepard's Court-Keeper's Guide*, c. 19. p. 118, 119.

XXVIII. R E M A R K.

If a Man of *None sane* M. 1. Mar. 1. Br. *Dum non fuit*
memorie be a Judge, all Acts *compos mentis* 7.
done by, and before him, shall stand good in Law.

XXIX. R E M A R K.

If a Woman being in a Frenzy, and of unsound Memory, kill her Husband, or another Man or Woman, she shall not forfeit her Dower. 12 H. 3. *Dower* 183. *Perkins*, sect. 365. *Tit. Dower*.

XXX. R E M A R K.

A Descent, during Minority, Marriage, Imprisonment, *Non sanæ mentis*, or being out of the Realm, do not take away an Entry. *Noy* in his *Grounds of the Laws*, c. 16. *Of Descents*.

XXXI. R E M A R K.

A Man becoming *Non compos mentis*, by Accident, is disseised, and suffers a Descent, albeit he recover his Memory and Understanding again, yet he shall never avoid the Descent. *Coke* in his *Comment on Littleton*, sect. 405. f. 247. a.

XXXII. R E M A R K.

Albeit the Eldest Son of a Sovereign Prince be unfit to bear Rule, albeit he be unable to Govern, either others, or himself; as if he be in a high degree furious, or foolish, or otherwise defective in Body, or in Mind, (unless
F he

he degenerate from Humane Condition) yet he cannot therefore be excluded from Succession ; because it is due unto him, not in respect of Ability, but by reason of his Priority of Birth. *Sir John Heyward in the Life of William II. p. 147, 148. Edit. 1613.*

From the Remarks come we to the Queries concerning Mad-men.

S E C T. III.

The Queries with their Solutions, relating to Furor Men.

I. Q U E R Y.

Whether Madness, or Insanity of Mind, ought to be proved by him, that objecteth the same?

S O L U T I O N.

EVery Person is presumed to be of perfect Mind and Memory, unless the contrary be proved : And therefore, if any Person go about to impugn, or overthrow a Testament, by reason of Madness, Insanity of Mind, or want of Memory, he must prove that Impediment : And if it be demanded, Wherefore then is that usual Clause, [*Of perfect Mind and Memory*], so duly observed in every Testament, if he that doth prefer the Will be not charged with the Proof thereof? It may be answered,

Swinburn in his Treatise of Wills, Part 2. Sect. 3. n. 5. p. 37. a. b. Edit. 1590.

swered, That that which is notorious, is to be alledged, not proved : And so this being accounted notorious, (because where the contrary appeareth not, the Law presumeth it) it need not be proved : And therefore 'tis supposed, that that Clause is more usual than necessary, and yet not hurtful.

Notorium probatione non indiget. Zouch's Elements, Pars 5. § 6. de Evidentia Cause.

II. QUERY.

Madness before the making of a Testament, whether it can be presumed to continue ?

SOLUTION.

It may be delivered for a Rule, That it is sufficient for the Party, which pleadeth the Insanity of a Testator's Mind, to prove, that the Testator was besides himself, before the making of his Testament, altho' he do not prove the Testator's Madness, at the very time of the making of the Testament, the Reason is : It being proved, that the Testator was once mad, the Law presumeth him to continue still in that Case, * unless the contrary be proved : For like as the Law presumeth every Man to be an honest Man, unless the contrary be proved ; and being proved, then he which is evil to be evil still. So concerning *Furor*, the Law presumeth every Man to have the use of Reason and Understanding, unless the contrary be proved ; which being proved accordingly, then he is presumed in Law to continue still

Swinburn, Part 2. Sect. 13. p. 37. b. 38. a. Edit. 1590.

* *Præsumptioni standum est, nisi contrarium probetur.* D. 23. 3. 57. in fine. D. 4. 2. 23. D. 12. 4. 6. 10. 2 Inst. 477. 10. Litt. 373, b. Bracton, l. 1. c. 9. n. 4. Fleta, l. 1. c. 6.

void of the use of Reason, and Understanding ; unless the Testator were besides himself, but for a short time, and in some peculiar Actions, and not continually for a long space, as for a Month, or more ; or unless the Testator fell into some Frenzy, upon some accidental Cause, which Cause is afterwards taken away ; or unless it be a long time since the Testator was assaulted with the Malady ; for in these Cases the Testator is not presumed to continue in his former Furor, or Frenzy.

III. QUERY.

Furor, or Madness, whether hard to be proved ? And how it may be proved ?

SOLUTION.

It is a hard and difficult Point, to prove, a Man not to have the use of Reason and therefore it is not sufficient for the Witnesses to depose, that the Testator was mad, or besides his Wits, unless they yield a sufficient Reason to prove this their Deposition ; as that they did see him to do such Things, or heard speak such Words as a Man having Wit, or Reason, would not have done or spoken ; namely, they did see him throw Stones against the Windows ; or did see him usually to spit in Men's Faces ; or being asked a Question, they did see him hiss like a Goose, or bark like a Dog, or play such other Parts as Mad-folks use to do. This, or the like Reason (whereby the Judge may be induced to esteem the Testator not to be of sound Mind) ought the Witnesses to yield, although they be not interrogated of the Cause of their Knowledge.

*Swinburn, Part 2. § 3.f.38.a.
Edit. 1590.*

IV. Q U E R Y.

Madness, whether it may be proved by singular Witnesses?

S O L U T I O N.

This Furor, or Madness, may be proved by singular Witness, so that the Witnesses be not singular in time, (for if one Witness depose of the Madness of the Testator at one time, and another Witness of his Madness at another time, this doth not sufficiently prove, that the Testator was mad :) But when the Witnesses agreeing in time, one depose of one mad Prank, another Witness of another mad Act at the same time; these prove, that the Testator was then mad, tho' they do not both depose of one and the same mad Act: But if some Witnesses do depose, That the Testator was of perfect Mind and Memory; and others depose the contrary, their Testimony is to be preferred, which depose he was of sound Memory; as well for that their Testimony tendeth to the Favour and Validity of the Testament, as for that the same is more agreeable to the Disposition of Nature; for every Man is a Creature reasonable.

Swinburn in his Treatise of Wills, Part 2. § 3. f. 38. a. b.

V. Q U E R Y.

Whether the Grant of a Copyhold Estate, made by the Lord of the Copyhold Mannor, that is a Mad-man, can be good in Law?

SOLUTION.

It is to be known, That any Person who may be a Grantor in a Deed, may be a good Grantor of a Copyhold

Coke of Copyholds, f. 89. 4 Co. f. 23. Clerk & Penifather's Case. Sheppard's Court-Keeper's Guide, cap. 19. p. 108, 109, 4th Edit. 1656. 8 Co. f. 63. b. Swain's Case.

Estate : For this any Person, Man, or Woman, that hath a lawful Estate in a Mannor for a time, may be a good Lord, to grant Copyholds, take Surrenders,

make Estates and Admittances, according to the Custom of the Mannor, notwithstanding the Disability of his Person, or Exility of his Estate ; and therefore 'tis held, that an Infant, an Excommunicate Person, a Person Outlawed in an Action Personal, a Felon before his Attainder by Outlawry, Verdict, or Confession, a Lunatick, or a Man distracted, being Lord of a Mannor, may grant Copyhold Estates for any time, according to the Custom of the Mannor, as another Man may do, and the Estates made by them are unavoidable.

VI. QUERY.

A Mad-man being seized of Land, and granting a Rent Charge out of this same Land, dies ; his Heir entering and the Grantee distraining for Rent-Arrear, whether the Heir may bring an Action of Trespass ?

SOLUTION.

If a Man *Non Sanæ Memoræ*, being seized of a Carve of Land, in Fee, and dies

P. 12 E. 4. 8 H. 39. H. 6. Perkins, § 21. Tit. Grants.

and his Heir enter, and the Grantee distrein for the Rent behind, the Heir shall have

have an Action of Trespass ; but if the Grantee had distrained, in the Life of the Grantor, for the Rent behind, the Grantor should not have an Action of Trespass ; for he cannot avoid his own Deed by disabling of himself.

VII. QUERY.

A Man of Sane Memorie, seised of Land, makes a Feoffment in Fee ; and after, when he is besides himself, or distracted, makes a Letter of Attorney for Livery of Seizin, which is executed accordingly ; the Feoffor dies, whether the Heir may lawfully enter upon the Feoffee ?

SOLUTION.

If a Letter of Attorney to make Livery of Seisin, is made of certain Land, by a Man of unsound Memory, and the Charter of Feoffment of the same Land was made before, when he was of good Memory, and then Livery of Seisin was made by force of the Letter of Attorney, without other Assent of the Feoffor, and the Feoffor die, now his Heir may enter upon the Feoffee, but the Feoffor himself cannot enter.

17 Ass. Pl. 17. Perkins, § 23.
Tit. Grants.

VIII. QUERY.

Whether the Entry of the Heir of a Furor Man be lawful, maugre a Descent had in the Life of his Ancestors ?

SOLUTION.

If a Man that is bereft of his Wits, hath cause to enter into his Lands and Tenements, which another hath

Littleton, Sect. 405.

in Fee, &c. and suffers a Discent during the time he was out of his Wits, and after dies, the Heir of *Non Sane Memorie*, may well enter upon him that is in by Discent; for the Heir in this case can well disable the Person of his Ancestors, for his own Advantage, because no Latches can be adjudged by the Law in him, which hath no Discretion in such case: And yet his Ancestors, which had the same Title, could not enter: For he who was out of his Memory at the time of such Discent, if he will enter after such a Discent, if an Action upon this be sued against him, he hath nothing to plead for himself, or to help him, but to say, that he was not of *Sane Memorie*, at the time of such Discent, &c. And he shall not be received to say this, for that no Man of full Age shall be received in any Plea by the Law to disable his own Person.

IX. QUERY.

What kind of Privies can disable him, who was deprived of the use of Reason and Understanding? Or, By whom, and what Acts done by a Mad-man, or one out of his Wits, can be avoided?

SOLUTION.

It is to be known, That the Disability to disable one's self, as to some Persons is personal, and extendeth only to the Party himself, and as to other Persons is not personal; but shall bind them also: And as to that it is to be observed, that there are four manner of Privities, *sc.* Privity in Blood, as Heir. 2. Privity in Representation, as Executors, or Administrators; who, as Mr. Littleton saith, represent the Person

4 Co. f. 124. a. *Beverley's Case of Non compos mentis.*

Littleton, Sect. 337.

Person of the Testator, or Intestate, 2 *Mar. Dyer* 112.
Acc. 3. Privy in Estate, as Donee in Tail, the Reversion, or Remainder in Fee, &c. 4. Privy in Tenure, as Lord by Escheat ; and two of which are Privies only may disable him who was *Non compos mentis*, and avoid his Deeds, Grants, and Feoffments, and two not : For Privies in Blood may shew the disability of the Ancestor, and Privies in Representation, the Infirmary of the Testator, or Intestate : But neither Privy in Estate, nor Privy in Tenure shall so do. And therefore if Donee in Tail, being *Non compos mentis*, maketh a Feoffment in Fee, and dieth without Issue, he in the Reversion, or Remainder, shall not enter, or take advantage of the *Non sane Memorie* of the Donee. The same Law of Lord by Escheat, if his Tenant being *Non compos mentis*, maketh a Feoffment in Fee, and dieth without Heir, he shall not avoid it : But there are some Acts done by a Man of *Non compos mentis*, which none of them shall avoid ; and therefore, if a Furor Man levieth a Fine, suffereth a Recovery, or acknowledgeth a Statute, or Recognisance, neither his Heirs, nor his Executors, shall avoid it ; for these are Matters of Record, which shall not be avoided by a bare Averment of *Non compos mentis*, for the Inconvenience which may ensue thereupon. Also such Averment is against the Office and Dignity of the Judge ;
 For he ought not to take
 any Conusance of a Fine, or
 Recognisance of him who is *Non compos mentis*.

18 E. 2. *Fines* 120. 17 *Aff.*

Pl. 17.

X. QUERY.

Whether a Man distracted, or out of his Wits, be relievable in a Court of Equity, to avoid a Deed made by himself ?

SOLU-

SOLUTION.

A. bound himself in a Bond of 1000 *l.* to *B.* and this Bond being sued against him, he exhibited a Bill in the Court of Requests, to be relieved against the same, and set forth in his Bill, that at the time of the entring into the said Bond, he was *Non compos mentis*; and whether in this Case a Prohibition should be awarded, was the Question? And in this Case it was resolved, That the same being against an express Maxim of the Common Law, That the Party shall not disable himself, that he shall not have Relief in any Court of Equity; for that shall be in Subversion of a Principle, and Ground in Law.

For the maintaining of this same Principle, I will subjoin a Judgment given by the Judges of the King's Bench, in the Case of an Action of Debt, upon an Obligation; and it was thus:

Debt upon an Obligation. The Defendant pleads, That at the time of the Obligation made, he was *De non sane memorie*. And it was thereupon demurred and adjudged to be no Plea: For he cannot save himself by such a Plea; and the Opinion of *Fitzherbert* held to be no Law. Wherefore it was adjudged for the Plaintiff.

Cro. El. f. 398. Pl. 4. Stroud v. Marshal.

XI. QUERY.

Whether this Maxim, That the Party cannot disable himself, shall hold good in Criminal Causes, as Felony, Murder, and Petit Treason?

SOLU-

SOLUTION.

The Judges in *Beverley's Case* do affirm, That a Man who is deprived of the use of Reason and Understanding, shall not lose his Life for Felony or Murder, because the Punishment of a Felon is so grievous, *sc. 1. To lose his Life. 2. To lose his Life in such odious manner, sc. By Hanging*; for he shall be hanged between Heaven and Earth, as unworthy of both. *3. He shall lose his Blood, as to his Ancestry*: For he is a Son of the Earth, without any Ancestor; and as to his Posterity also, for his Blood is corrupt, and he hath neither Heir, nor Posterity. *4. His Lands. 5. His Goods.* And in such Case the King shall have, *Annum, & diem, & vastum*; to the intent his Wife and Children shall be cast out, his Houses pulled down, his Trees eradicated and overthrown, his Meadows ploughed up, and all that he hath for Comfort, Delight, or Sustenance, wasted and destroyed; because that he in such felonious manner offended against the Law; and all that was, *Ut pœna ad paucos, metus ad omnes perveniat.* But the Punishment of a Man, who is deprived of Reason and Understanding, cannot be an Example to others. *Secondly*, No Felony, or Murder, can be committed without a Felonious Intent, or Purpose*: But

Furiosus non intelligit quid agit & animo, & Ratione caret, & non multum distat a Brutis, as † *Bracton* saith, and therefore he cannot have a Felonious Intent.

Also for the same Reason,

Non compos mentis cannot commit Petit Treason: As if a Woman *Non compos mentis*, kill her Husband, as appeareth, 12 H.3. Forfeiture 33. Vide *Stamford*, f.45. *Kitchin* 56. Tit. Forfeiture, Edit. 1651.

* 21 H. 7. 31. 26 Aff. 27 F. N. B. 202. *Stamford's Pleas of the Crown*, 16. 8. c. 9.

† *Bracton*, lib.5. Tract.5. c.20. nu. 1. f. 420. b. & *Fleta* lib. 6. c. 40. nu. 1.

Sir Edward Coke tells us, That this Maxim, *That the Party shall not disable himself*; holdeth only in Civil Causes, but not in Criminal Causes, as Felony, &c. For

Comment on Littleton, § 405. f. 247. b.

in such the Act and Wrong of a Mad-man shall not be imputed to him; because in those Causes, *Actus non facit*

Note, *The Mirror of Justices* says, That King Alfred hanged Cole, for giving Sentence of Death on one Iwe, when he was mad and distracted in his Wits, c. 5. § 1. p. 297. Edit. 1642.

Reum, nisi mens sit rea, and he is *Amenus* (i. e.) *sine mente*, without his Mind or Discretion, and *Furiosus solo furore punitur*; a Mad-man is only punished by his Madness.

Add hereunto what *Plouden*, and the Author in his Exposition of the Terms of Law, say of distracted Persons in Cases Criminal.

The former expresth himself thus: If a Man *Non*

Com. fol. 19. a. Reneger & Foggassa, & f. 465. a. Eyston v. Studde.

sanæ memoriæ, kill another, altho' he hath broken the words of the Law, yet he hath not broken the Law;

for that he had no Memory, nor Understanding, but meer Ignorance, which came to him by the Hand of God; and therefore it is said to be involuntary Ignorance, to which the Law imputes the Act to be done, because there was no default in him; and for this he shall be excused, he being ignorant by Compulsion.

The latter speaks in this wise: When an Act of Parlia-

Fol. 150. b. Tit. Equity.

ment is made, that whosoever doth such a thing shall

be a Felon, and shall suffer Death; yet if a Mad-man, or an Infant of young Years, that hath no Discretion, do the same, they shall be no Felons, nor suffer Death therefore.

Having given my Reader an Account of the Common Law, relating to *Non sane memories*, in the point of Criminal Matters, I will present to his View, Civil Law
Texts,

Texts, concerning such distracted Persons as are guilty of *Homicidium*, or killing other Men.

Now the Civilians tell us, That such as kill, either Father, or Mother, or those that are in the place of Father, or Mother, or any that are of next A-kin, their Punishment is Death; and in the Case of the Father and Mother, the Pain of Death, the Parricide being first well whipt, so that the Blood do follow in good plenty, he being sowed up into a Sack, together with a Dog, a Cock, a Viper, an Ape, is thrown into the Depth of the Sea. But if a Mad-man (say they) should kill his Father, or Mother, &c. he shall be no way punished, reckoning that his own Furor, or Madness, is a sufficient Punishment to himself.

Pœna Parricidii more majorem hæc instituta est, ut Parricida virgis sanguineis verberatus, deinde culleo insuatur cum Canem, Gallo Gallinaceo, & vipera, & simia; deinde in Mare profundum culleus jactetur, D. 48. 9. 9. Instit. 4. 18. 6.

Sane si per furorem, (saith the Lawyer Modestinus) aliquis parentem occiderit, impunitus erit, ut divi fratres rescripserunt super eo, qui per furorem matrem necaverat. Nam sufficere, furore ipso eum puniri, D. 48. 9. 9. 2. D. 1. 18. 14.

Infans, vel Furiosus (saith the same Lawyer) si hominem occiderint, lege Cornelia non tuentur: Cum alterum innocentia Consilii tuetur, alterum fati infelicitas excusat. D. 48. 8. 12. On which Text Gothofredus has this Note: *Furiosum fati infelicitas a pœna excusat, ideoque non facere sed pati injuriam dicitur:* Citing for it the Lawyer Ulpian, whose Words are as follow: *Sane sunt quidam qui facere non possunt, ut puta Furiosus, & impubes, qui doli capax non est; namque hi pati injuriam solent, non facere; cum enim injuria ex affectu facientis consistat, consequens erit dicere, hos sive pulsent, sive convicium dicunt injuriam fecisse non videri. D. 47. 10. 3. 1.* Vide what the Canon Law saith of a Furor Man, that

that kills or wounds another Person. *Clement. Lib. 5. Tit. 4. de Homicidio voluntario, & casuali.*

XII. Q U E R Y.

If a Man while he is Non compos mentis, destroys himself, whether he can be said to be Felo de se?

S O L U T I O N.

If a Man lose his Memory by the Rage of Sickness, or Infirmary, or otherwise, and kill himself, while he is *Non compos mentis*, he is not *Felo de se* : For as he cannot commit Murther upon another, so in that Case he cannot commit Murther upon himself. If one during the time that he is *Non compos mentis*, giveth himself a mortal Wound, whereof he, when he hath recovered his Memory, dieth, he is not *Felo de se* ; because the Stroke, which was the Cause of his Death, was given, when he was not *Compos mentis* : *Et Actus non facit reus, nisi mens sit rea.*

So it is said in *Shelly's Case* : If a Man, who is not *Compos mentis*, give unto himself a mortal Wound, and before he dieth, he becomes of *Sane Memorie*, and afterwards dieth of the same Wound ; in this Case, altho' that he dieth of *Sane Memorie*, yet because the Original Cause of his Death, *viz.* the Stroke, was, when he was *Non compos mentis*, he shall not be *Felo de se* ; because the Death, &c. hath relation to the Original Act, which was the Stroke, or Wound. 1 Co. f. 99. b. *Shelly's Case*, *Vide* 4 Co. f. 42. a. *Heydon's Case*, 22. E. 3. Corone 244. *Plowden's Comm.* f. 260. a.

Now let us hear what Resolution *Bracton* and *Fleta*, two old Authors, give of this our Question.

The

The former speaks in this wise : *De Furioso quid dicetur, qui rationem non habet ? Et de mente Capto, & frenetico, vel si ille qui laborat in acuta infirmitate seipsum submerserit vel interfecerit, quaeritur an talis feloniam faciat de se ipso ? Videtur quod non, nec hereditatem foris faciunt nec Catalla, eo quod sensu carent, & ratione, & non magis quam Brutum animal injuriam facere possunt, nec feloniam, cum non multum distent a Brutis, &c. Lib. 3. Tract. 2. de Corona, c. 31. f. 150. 8.*

The later, viz. *Fleta*, does concur with *Bracton*, and pronounceth thus : *Similiter Furiosi, Frenetici, Infantuli & mente Capti, & in acuta febris laborantes, quamvis seipsos interfecerint non tamen Feloniam committunt, nec hereditates foris faciunt, nec Catalla, eo quod sensus Carent, & Ratione. Lib. 1. c. 36. de Infortuniis.*

XIII. QUERY.

Whether he that is Non compos mentis, and totally deprived of all Compassings, and Imaginations, can commit High-Treason; by Compassing or Imagining the Death of the King ?

SOLUTION.

Tho' all Laws do exempt a Mad-man from Punishment, because their Actions are not governed by their Will, and the Will of Man being set apart, all his Deeds are indifferent, neither can the Body offend, without a corrupt or erroneous Mind; yet if a Mad-man kill, or offer to kill the King, it is High-Treason : For the King, *Est Caput, & Sa-*
lus

C. 9. 9. 20. Tolle voluntatem & erit omnis actus indifferens, quia affectio tua nomen imponit operi tuo, & crimen non contrahitur nisi nocendi voluntas intercedat. Bracton, l. 2. tract. 1. De Proditionibus, c. 2. nu. 14.

4 Co. f. 124. b. *Beverley's Case.* *lus Reipublicæ & a Capitæ bona valetudo transit in omnes* : And for this Cause their Persons are so sacred, that none ought to do, or offer them Violence ; but he is, *Reus Criminis læsæ Majestatis, & pereat unus, ne pereant omnes.* Thus say the Judges in *Beverley's Case.*

Sir Robert Holbourn, in his Reading upon the Statute of 25 E. 3. c. 2. *De Proditionibus*, says thus :
Reading, Printed Anno 1681.
 P. 17, 18.

‘ All Ages are within this Law, as in Folks which
 ‘ have Knowledge, or Men of *Non Sanæ Memorix*, and
 ‘ a Mad-man is also within this Law, as to that part of
 ‘ the Statute, which concerns more immediately the Per-
 ‘ son of the King : For if any of them aforementioned
 ‘ in this Division, shall compass his Death, it is Treason
 ‘ within the first Clause ; but not in the Clause of levying
 ‘ War : But a Man that is *Surdus, cæcus, & mutus*, is
 ‘ not within this Law ; for it is impossible for him to have
 ‘ Understanding. And afterward he tells us, That *J. S.*
 ‘ after he became mad, kills
 ‘ the Queen ; this is Trea-
 ‘ son within this Law : First, Because a Man may coun-
 ‘ terfeit himself to be mad ; and he may do it so cunning-
 ‘ ly, as it cannot be discerned, whether he be mad or no.
 ‘ The Second is, in respect of the great Esteem that the
 ‘ Law gives to the Person of the King ; for he is the Foun-
 ‘ tain of Justice : And for the Proof of this Point, that
 ‘ it may be understood, we ought to see what the Com-
 ‘ mon Law was, before the making of this Statute, as
 ‘ to this Point ; and then ought to enquire, and see how
 ‘ the Law is altered, since the making of the Statute ; and
 ‘ by this means we shall find out the Law, and the Rea-
 ‘ son thereof : It is true, that the Law without special
 ‘ words, will not bind an Infant, or a Mad-man, as to
 ‘ the

the Punishment of their Bodies ; but yet it will extend to their Lands and Estates : But this our Law is no new Law, but only a declarative Law ; and in that Case general words will bind an Infant, or a Mad-man, without any special words. That it was Treason at the Common Law, is apparent in *Britton*, and the *Mirror of Justice* ; and this Statute doth not declare, who shall be Traitors, but what shall be Treason ; and therefore by this Act, it is Treason in a Mad-man, or whomsoever shall commit it ; for a Mad-man is not excepted out of this Law : And to make this appear more fully, you may be pleased to read the Case of *Beverley* : That a Man that is *Non compos mentis*, may commit High-Treason, altho' he cannot commit Petty-Treason, nor Felony. And so it is also in *Dalton's Justice of Peace*, 206. That if a Man that is *Non compos mentis*, shall kill the King, this is High-Treason. Nay, *Beverley's* Case goes farther, and says, That if he shall offer only to kill the King, this is High-Treason.

Eritton, f. 16. a. c. 8. & c. 22.
f. 39. a. b. *Mirror*, c. 2. § 11.
& c. 1. § 4. *Vide Bracton*, fol.
118. b.

Thus much for the Opinions of the Judges in *Beverley's* Case, and of *Holbourn* ; now let us see what Sir *Edward Coke* says concerning Mad-men, as to the Point of committing High-Treason.

A Man (saith he) that is *Non compos mentis*, or an Infant within the Age of Discretion, is not [*unHome*] within the Statute of 25 E.

Coke in his Third Institutes, fol. 4.

3. c. 2. for the principal End of Punishment is, That others by his Example may fear to offend *, *Ut pœna ad paucos, metus ad omnes perveniat*. But such Punishment can be no Exam-

* *Ut unius pœna metus possit, esse multorum*, D. 16. 3. 31. D. 48. 3. 6. Cod. 9. 27. 1. D. 48. 19. 6. 1.

82 The Law of *Non Compos Mentis*.

ple to Mad-men, or Infants, that are not of the Age of Discretion. And God forbid (quoth he) that in Cases so penal, the Law should not be certain : And if it be certain in Case of Murther and Felony, *a fortiori*, it ought to be certain in Case of Treason.

If a Man commit Treason, or Felony, and confesseth the same, or be thereof Convict ; if afterward he become *De non sane Memorie*, (*qui patitur exilium mentis*) he shall not be called to answer : Or if after Judgment he become *De non sane Memorie*, he shall not be executed ; for it cannot be an Example to others.

Co. 3 Inst. f. 4.

Add to what he said before, this which follows :

If a Mad-man had killed, or offered to kill the King, it was holden for Treason ; and so it appeareth by King Alfred's Law, before the Conquest : But now by the Statute of 25 E. 3. c. 2. and by force of these words, *Fait compasser, ou imaginer la mort*, he that is *Non compos mentis*, and totally deprived of all Compassings, and Imaginations, cannot commit Treason, by Compassing or Imagining the Death of the King : For *Furiosus solo furore punitur* : But it must be an absolute Madness, and a total Deprivation of Memory. And this appeareth by the Statute of 33 H. 8. for there-

Co. 3 Inst. f. 6.

Cap. 20.

by it is provided, That if a Man being *Compos mentis*, commit Treason ; and after Accusation, &c. fall to Madness, that he might be tried in his Absence, &c. and suffer Death, as if he were of perfect Memory : For by this Statute of 25 E. 3. a Mad-man could not commit Treason. It was further provided, by the said Act of 33 H. 8. That if a Man attaint-

ed of Treason became mad, that notwithstanding he should be executed ; which cruel and inhuman Law (says he) lived not long, but was repealed : For in that Point also it was against the Common Law ; because by Intendment of Law, the Execution of the Offender is for Example ; but so it is not, when a Mad-man is executed ; but should be a miserable Spectacle, both against Law, and of extreme Inhumanity, and Cruelty, and can be no Example to others.

XIV. Q U E R Y.

Whether a Mad-man be punishable in Trespas ?

S O L U T I O N.

In Capital Causes, *in favorem vite*, the Law will not punish in so high a degree, except the Malice of the Will, and Intention, appear : But in Civil Tre-

Sir Francis Bacon in his Elements of the Common Laws of England, Reg. 7. p. 31, 32.

spas and Injuries, that are of an inferiour Nature, the Law doth rather consider the Damage of the Party wronged, than the Malice of him that was the Wrong-doer : And therefore, if an Infant, within Years of Discretion, or a Mad-man, kill another, he shall not be impeached thereof ; but if they put out a Man's Eye, or do him like corporal Hurt, they shall be punished in Trespas.

Concerning a Mad-man's doing a corporal Hurt, the Civil Law runs thus : *Quærimus si Furiosus damnum dederit, an Legis Aquiliæ Actio sit ? Et pegasus negavit. Quæ enim in eo culpa sit, cum suæ mentis non sit ? Et hoc verissimum : Cessabit igitur Aquilia Actio, quemadmodum, si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit.* D.9.2.5.2.

Culpam non admittit, quæ suæ mentis non est. Gothofreda.

XV. Q U E R Y.

Whether a Furor Man can be a Purchaser ?

S O L U T I O N.

A Man of *Non sane Memorie*, may, without the Consent of any other, purchase Lands ; but he himself cannot wave it : But if he die

Coke in his Comment on Littleton, § 1. f. 2. b.

in his Madnefs, or after his Memory recovered, without agreement thereunto,

his Heir may wave and disagree to the State, without any Cause shewed, and so of an Idiot : But if a Man of *Non sane Memorie*, recovers his Memory, and agree unto it, it is unavoidable.

So it is if a Mad-man makes a Gift, or Grant, and then recovering his Wits, confirms it ; this Gift, or Grant is unavoidable, as appears by *Bracton* and *Fleta*.

The former speaks thus : *Convalescit Donatio facta a Furioso, si sanæ mentis effectus, donum illud confirmaverit, vel ratum habuerit.* Lib. 2. cap. 5. nu. 4. f. 11. b. 12. a.

The later saith in this wise : *Dare poterit Furiosus, & quandoque fatuus, dum tamen donum ex post facto confirmaverit, cum recuperaverit sanitatem.* Lib. 3. cap. 3. nu. 8.

With which Authors does agree *Dionysius Gothofredus's* Note upon D. 24. 3. 22. 10. *Furiosus ad suam mentem reversus ratam rem habere potest ; Ratamque habenda facit utilem.*

XVI. Q U E R Y.

Whether the Will of one that afterwards becomes mad, or distracted, shall stand good in Law ? S O-

SOLUTION.

If a Man that is of good and perfect Memory, makes his Will, and afterwards by the Visitation of God, he becomes of unsound Memory, this Act of God shall not be a Revocation of his Will, which he made, when he was of good and perfect Memory. With this Resolution do concur our old Jurists, *Bracton* and *Fleta*, as also the Texts of the Civil Law.

4 Co. f. 61. b. Forse, and Hembling's Case.

1. *Bracton* : *Furor superveniens nihil adimit non magis quam morbus incurabilis sicut Lepra : Secundum quod dicitur, quod multa impediunt contrahendo, quæ non dirimunt Contractum, & ita sunt multa, quæ impediunt promovendo, quæ non dejiciunt jam promotum.*

Lib. 5. Tract. 5. Cap. 20. nu. 1. f. 420. b.

2. *Fleta* : *Furor alienationem prius factam non perimit, & sicut multa impediunt contrahenda quæ non dirimunt Contractum, ita sunt multa, quæ impediunt promovendum, quæ non dejiciunt jam promotum.*

Lib. 6. Cap. 40. nu. 1.

3. Civil Texts : *Neque Testamentum recte factum, neque ullum aliud negotium recte gestum, postea furor interveniens perimit. Siquis post testamentum factum, adversa valetudine, aut quolibet alio casu mutus, aut surdus esse cæperit, ratum nihilominus manet ejus Testamentum. Vide D. 28. 1. 20. 4.*

Instit. 2. 12. in Fine.

Instit. 2. 12. 3. in Fine.

XVII. QUERY.

Whether a Fine before a Judge, of Non sane Memorie; or a Grant of an Office made by him, be good in Law?

SOLUTION.

There is a Diversity taken between a Fine levied before a Judge of Non sane Memorie, and a Grant of an Office made by him: For Si Judge, ou Justice soit de non sane Memorie, uncore les Fines, Judgements, & auters Records, que sont devant luy, serra bon: Mes e contra del done d'Office, vel hujusmodi per luy, car ceo est matter en fait, & l'auters sont matters de Record, Car matters en fait poient estre avoid per non sane Memorie. Contra de matter de Record. If a Judge, or Justice, be distracted, yet the Fines, Judgments, and other Records that are before him shall be good: But otherwise it is, of the Grant of an Office, or the like, by him made: For this is Matter in Fact, and the others are Matters of Record; for Matters in Fact may be avoided by Non sane Memorie; otherwise it is in the Case of Matter of Record. Br. Dum non fuit Compos mentis 7.

XVIII. QUERY.

A Mad-man makes an Exchange of his Land, with J. S. for other Land, and the Exchange is accordingly executed, the Non sane Man dies, whether his Heir can avoid this Exchange, having first entred into the Land taken in Exchange?

S O L U

SOLUTION.

If a Man of unsound Memory, being seized of Land in Fee, exchangeth the same Land with a Stranger, for another Acre of Land in Fee, and the Exchange is executed, and he of unsound Memory dieth, and his Heir enters into the Land taken in Exchange by his Father, he shall not avoid this Exchange. *Perkin, Sect. 298. Tit. Exchanges.*

XIX. QUERY.

Whether, and in what Cases Lachesse can prejudice an Idiot, Mad-man, or other Non compos mentis?

SOLUTION.

There are some who have made a Difference between Bar of *Non compos mentis*'s Right, and Bar of his Entry; for in Case of Bar of his Right, his *Lachesse*, or Negligence, shall not be prejudicial to him; but in such special Case, if he become of unsound Memory, he shall shew, that he was not *Compos mentis*: As if a Man *Non compos mentis* be disseised, and the Disseizor levieth a Fine in this Case at the Common Law, altho' the Year and Day be past, yet he who was *Non compos mentis*, shall not be bound thereby, but he may well enter; and that, they say, is proved by the Statute *De modo levandi Fines*, made 18 E. 1. which is but a Declaration of the Common Law, *scil.* That a Fine is so high a Bar, and of so great force, and of so high nature in it self, that it barreth not only those who are Parties, and Privies to the Fine, and their Heirs, but all other of the World, who

4 Co. fol. 125. a. b. Beverley's
Case of *Non compos mentis*.

are of full Age. out of Prison, and of good Memory, and within the four Seas, the Day of the Fine levied, if they put not in their Claim, by their Action, or Entry, in

* *Excusatur ille (saith Fleta) cujus interfuerit quod Clamium infra annum & diem non apposuerit multis modis, ut si fuerit infra aetatem, tempore quo finis fuit levatus, vel furiosus, vel mente captus, & non sane mentis vel Idiotus vel surdus, vel mutus, vel si detentus fuerit in Prisons, &c. Lib. 6. c. 54. nu. 1. de Excusationibus.*

the County within the Year and the Day ; by which it appeareth, that no Lachesse

* of a Man *Non compos mentis*, shall bar him of his Right. Also it appeareth by the Statute of 4 H. 7. c. 24. That in such Case if a Man levieth a Fine with Proclamations, and at the time of the Fine levied, he

who hath Right, is *Non compos mentis*, and afterward he recovers his Memory, that in this Case he ought to sue his Action, or Entry, within five Years after he becometh of sound Memory ; and in such Case in Pleading, he shall shew, that at the time of the Fine levied, he was *Non compos mentis*, and all the special Matter : But if he who has such Right be an Idiot, or *Non compos mentis*, and never recovereth his Memory, the Heir may have an Action, or make his Entry when he will ; for he is excepted out of the Body of the Act, and is not tied to make any Entry, or bring his Action within any time, but the Party himself, if he recover his Memory. The same Law of him who is beyond Sea, at the time of the Fine levied, and dieth, there his Heir may enter, or bring his Action when he will : And in such Case, the Lord by Escheat shall take Advantage of his *Non sane Memorie*, Infancy, Imprisonment, or being beyond Sea of his Tenant : For if Lord and Tenant be, and the Tenant be disseized, and the Disseizor levieth a Fine, the Disseizee being within Age, *Non compos mentis*, or in Prison, or beyond the Sea, dieth without Heir, the Lord, by Escheat, shall take advantage of every of them, against the

the Disseizor. So if a Collateral Warranty descend upon a *Non compos mentis*, which he might have avoided by Entry; but an Idiot, or *Non compos mentis*, by their Lachesse, shall be barred of their Entry, because if they be disseized, and the Disseizor dieth seized, it shall take away their Entry; but after their Death, their Heir can enter, or take advantage of the Infirmitie of their Ancestor, and his Lachesse, which shall not prejudice his Heir of his Entry; and that appeareth by *Littleton*, Sect. 405. For *Littleton* saith, No Lachesse can be adjudged by the Law, in him who hath not Discretion in such Case, *scil.* having regard to his Heir, and so is the difference.

XX. QUERY.

Whether he that is a Furor Man, can be appointed Tutor?

SOLUTION.

He that is not 21 Years old, or is not of perfect Mind and Memory, may be assigned Tutor: But it is to be understood, that he shall be Tutor when he is of full Age; or when he doth return to Sanity of Mind. *Swinburn* in his *Treatise of Testaments and Last Wills*, Part 3. Sect. 10. *Cowell's Institutes*, Lib. 1. Tit. 14. p. 29. Edit. 1605.

Furiosus, vel minor viginti quinque annis Tutor testamento datus, Tutor tunc erit, cum Compos mentis, *Inst.* 1. 14. 2.
aut major viginti quinque annis fuerit factus, saith the Emperor *Justinian*.

Furiosus, (saith the Lawyer *Paulus*) *si tutor datus fuerit potest intelligi ita dari, cum suæ mentis esse cæperit.* *D.* 26. 1. 11.

Ulpian,

Ulpian, Lib. 3. to Sabinus : *Si Furiosus testamento tutor detur, si quidem, cum furerere desierit : Tutorem esse recte datum proculus ex-*

istimat. quod si datus sit pure, negat proculus valere dationem. Sed est verius, quod & pomponius ait, recte videri datum, & tunc fore tutorem, cum sapere cæperit.

XXI. QUERY.

Whether a King, during the time of his Furor, or Insanity of Mind, be capable of making Peace ?

SOLUTION.

They that have Power to begin a War, have also Power by Articles of Agreement to end it ; for every

Sue quisque rei moderator, atque Arbitr. Cod. 4. 35. 21.

Man is the best Moderator of his own Affairs ; whence it follows, that in a War on both sides publick, the

Power of making Peace belongs to them, who are intrusted with the Supreme Authority : As in a Government

In regnis Regum est fædus fadus facere, Grot. lib. 2. 1. 15. § 3.

truly Monarchical, to the King, so as he be no ways disabled to exercise that Authority : For in Case a

King be not at Years of Discretion, or if he be not of sound Memory, he is not capable of making Peace. *Grotius of the Rights of War and Peace, Lib. 3. c. 20. sect. 2, 3. Vide Lib. 1. c. 3. sect. 24.*

XXII. QUERY.

Whether it be lawful to speak Untruth to Mad-men ?

SOLU-

SOLUTION.

In Case (saith *Grotius*) we converse either with a Child, or a Mad-man, if what we say be false, it cannot be imputed as a Lye ; because (as *Quintilian* saith) it is universally permitted as profitable, to instruct Infants by Tales and Fables ; but the immediate Cause is, because not having a Freedom of Judgment, Infants, and Mad-men cannot be injured about that Liberty which they have not.

Lib. 3. c. 1. § 12. de Jure Belli, & pacis.

Having given the Reader an Account of the Law of *England*, relating to Mad-men ; as also here and there made mention of the Civil Law of the *Romans*, I shall conclude this Second Part of my Tract, with a *Synopsis* of the Mad-man's Law, framed by a very Learned *Civilian*.

Vere furiosi (non tempore intervalli non simulati) non tenentur Parricidii. D. 48.

9. 9. 2. *Homicidii, D. 48.* *Dionysius Gothofredus ad 8. 12. Tutelæ male administratæ, D. 26. 7. 61, Injurie, D. 47. 10. 3. 1. Etiam erga principem, c. 9. 7. Lex unic. nec possunt facere Testamentum, c. 6. 22. 9. Etiam ad pias Causas. Bartolus in l. 1. c. de Sacrosanct. Eccles. nec Codicillos, D. 29. 7. 3. nec sponsalia, D. 23. 1. 8. Nec Matrimonium, D. 23. 2. 16. 2. Nec Stipulationem, Instit. 3. 20. 8. D. 44. 7. 1. 12. D. 46. 1. 70. 4. c. 4. 38. 2. Nec quid aliud contrahere, D. 50. 17. 40. Vel agere, cum nec velle possint, D. 29. 7. 2. 3. D. 50. 17. 40. Cum absentium, & quiescentium loco habeantur, D. 50. 17. 167. (nisi ubi eorum negotia gesta sunt, D. 3. 5. 3. 5.)*

9. 9. 2. Homicidii, D. 48. *Dionysius Gothofredus ad 8. 12. Tutelæ male administratæ, D. 26. 7. 61, Injurie, D. 47. 10. 3. 1. Etiam erga principem, c. 9. 7. Lex unic. nec possunt facere Testamentum, c. 6. 22. 9. Etiam ad pias Causas. Bartolus in l. 1. c. de Sacrosanct. Eccles. nec Codicillos, D. 29. 7. 3. nec sponsalia, D. 23. 1. 8. Nec Matrimonium, D. 23. 2. 16. 2. Nec Stipulationem, Instit. 3. 20. 8. D. 44. 7. 1. 12. D. 46. 1. 70. 4. c. 4. 38. 2. Nec quid aliud contrahere, D. 50. 17. 40. Vel agere, cum nec velle possint, D. 29. 7. 2. 3. D. 50. 17. 40. Cum absentium, & quiescentium loco habeantur, D. 50. 17. 167. (nisi ubi eorum negotia gesta sunt, D. 3. 5. 3. 5.)*

5. 3. 5.)

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5. 3. 5.) *Et Curator eis detur*, D. 27. 10. 1. *Præterea furiosi testes esse non possunt*, D. 28. 1. 20. 4. *nec Judices* D. 42. 1. 9. *nec Tutores*, D. 26. 1. 11. *Retinent tamen statum, Dignitatem, Magistratum, potestatem, Dominium rei suæ*, D. 1. 5. 20. *Uxorem, & Matrimonium, & Jus Patriæ potestatis*, D. 1. 6. 8. *Quamquam sine eorum consensu Liberi contrahere nuptias possunt*. Cod. 5. 4. 25. *Et dotari moderate a Parentum Curatoribus*, C. 1. 4. 28. *Observandum tamen Leonem*. Novel. 111, & 112.

Hitherto of the Description, Remarks, and Questions, with their Resolutions, appertaining to such as are wholly deprived of the use of their Reason; let us now come to treat of the Law belonging to *Lunaticks*, or *Moon-sick Persons*.

PART the Third.

• Of the Lunatick having sometime his Reason, and sometimes not.

SECT. I.

The Description of a Lunatick, and the Word, whence derived.

AS for the Origination of the word *Lunaticus*, *Lunatick*, we are told, it comes from *Luna*, the *Moon*; and so the Party is said to be *Moon-sick*: In *Italian* he is called *Lunatico*; in *Spanish*, *Alunado*; in the *Greek* Language Σελιγαζόμενος, a Σελήνη, i. e. *Luna*; in the *Teutonic* he is termed, *Mohn-Suchtig*, a *Moh*, i. *Luna*, & *Suchtig*, i. *agrotus*, *æger*, ut illi, qui certis *Lunæ* temporibus *insania* vexantur.

Dr. *Hammond*, (that learned Divine) concerning the word *Lunatick*, saith thus:

The word Σεληνιάζοντας, Annotation on Ver. 15. of Mat-
coming from Σελήνη, the thew, c. 17.

Moon, is directly parallel to the *English Lunatick*, from *Luna*, the *Moon*; also the *English* word *Lunacy*, and *Lunatick*, is vulgarly taken to signifie a *Mad-man*, and nothing else, viz. That Species

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cies of Madness which comes on Men at such a Set-time; toward the Full of the Moon, as ordinary it is observable; in those that have any Intervals.

This Lunatick, according to the Law of England, is one, that hath sometime his Understanding, and sometime not : *Aliquando gaudet lucidis intervallis* ; and therefore he is called, *Non compos mentis*, so long as he hath not Understanding. Coke in his Comment on *Litton*, *sect. 405. f. 247. a.*

The Judges in their Resolution in the Case of *Beverley*, give this Description of a Lunatick : *Lunaticus, qui gaudet lucidis intervallis* ; and sometimes is of sound Memory, and sometimes is *Non compos mentis*.

Thus much for the Etymology, and Description of a Lunatick : Now for some Remarks relating to him.

S E C T. II.

The Remarks concerning Lunaticks.

I. R E M A R K.

ILLI, qui quarta Luna, seu interlunio nascuntur huic morbo sunt obnoxii, nam ex opinione Astrologorum, si luna fuerit male collocata, aut spasticos, aut Lunaticos, aut Caducos facit : Those that are born during the In-

Interlunium dicitur id spatium temporis, in quo nec amplius detus Luna apparet, nec adhuc nova videtur.

Interlune, or Conjunction of the Sun and Moon, are liable to the Disease of Lunacy : For, according to the Opinion of Star-Gazers, if the Moon be ill set, or placed, it causeth Men to be subject, either to Convulsions, to Lunacy, or to the Falling-sickness : And concerning the last of these, Physicians have a Rule, viz. *They who are troubled with the Falling-sickness, upon their good Days are not accounted whole.*

Qui Comitialem morbum habent, ne quidem diebus quibus morbo vacant, sani dicuntur.

II. REMARK.

The Roman Lawyers do distinguish every where, betwixt him that is *Furiosus*, and him who is *Demens* : For *Furiosus est, qui omni intellectu caret.* And therefore *Nihil utiliter agit, nisi tempore dilucidi intervalli.* *Nam aliis hominibus continuum furoris infortunium accidit ; alios furoris morbus non sine laxamento aggreditur, sed in quibusdam temporibus quædam iis intermissio pervenit :* But with them, *Demens* is he : *Qui est mentis Errore ductus, ea Captus non usquequaque, not continually.* D 2. Zouch's Elements Jurisprud. Pars 2. sect. 4. de Valetudine Hominis.

C. 5. 4. 25. C. 1. 4. 28.
C. 5. 37. 28.

D. 50. 17. 5.

C. 5. 70. 6.

III. REMARK.

The King of England, by his Prerogative, is *Summus Regni Custos*, and hath the Custody of the Persons and Estates of such, as for want of Reason and Understand-

Cicero, 1. Tuscul. 3. says, *Eum qui errore mentis affectus est, vetari XII. Tabulis rerum suarum Esse Dominum.*

ing,

ing, cannot govern themselves, or manage their Estates ; so that the Persons and Estates of Lunaticks, are as well in the Custody of the King, as of Idiots ; but with this difference : That of Idiots to his own use, and that of Lunaticks to the use of the next Heir. Statute of *Prærogativa Regis*, c. 10. 4 Co. f. 128. *Beverley's Case of Non compos mentis*. *Stamford Super Prærog. Regis*, c. 10. *Cowell's Institutes*, Lib. 1. Tit. 23. n. 2. p. 43, 44. *Edit.* 1605.

IV. R E M A R K.

Such as by Office are untruly found Lunaticks, may have their Traverse to the same, as appears by the Statute of 2 E. 6. c. 8.

V. R E M A R K.

Those that are Parties to a Fine, ought to be of good Memory, as appears by the Statute *de Finibus*, 18 E. 1. Stat. 4. And therefore Lunaticks, and such as are not of *Sane Memorie*, may not be received to levy a Fine ; but if they be, the Fine will be good and unavoidable. *Fieri non debet sed factum valet*. 4 Co. 124. *Beverley's Case*, *Sheppard's Practical Counsellor*, c. 2.

VI. R E M A R K.

If the Parties to whom a Right, or Title, comes, after a Fine levied be not of *Sane Memorie*, (a Lunatick being such) he, or his Heirs, have time to pursue his, or their Right or Title, within five Years after such Imperfection removed : So also has he in Case, he had a Right of Title at the time of the Fine levied, 1 R. 3. c. 7. & 4 H. 7. c. 24.

VII. R E M A R K.

If Tenant in Tail levy a Fine, the Issue in Tail, tho' a Lunatick at the time of the Fine levied, is barred for ever by the Fine, so levied by the Tenant in Tail, forasimuch as he is a Privy, and out of all the Savings of 4 H. 7. c. 24. 3 Co. f. 91. *The Case of Fines*.

VIII. R E M A R K.

It is enacted by the Statute of 34 & 35 H. 8. That the Will, or Testament made of any Mannors, Lands, Tenements, or other Hereditaments, by any Person *De non sane Memorie*, shall not be taken to be good, or effectual in the Law: But a Lunatick in his Fits, is a Person of Insanity of Mind, and therefore his Will or Testament, is not valid in Law.

34, & 35 H. 8. c. 5.

Furiosus testamentum facere non potest, quoniam mentem non habet, ut testari de ea re possit. Ulpian. tit. 20. de Testamentis.

IX. R E M A R K.

If a Person that becomes of *Non sane memorie*, by Accident, be disseised, and suffer a Discent; altho' he return to his former right Understanding again, yet he shall never avoid the Discent; and so it is *a Fortiori* of one, that hath *Lucida Intervalla*, Co. Litt. 247. a.

X. R E M A R K.

The Act of 23 El. c. 3. does not bar a Lunatick, or other *Non compos mentis*, of his Writ of Error, for reversing a Fine, so that he, or his Heirs, pursue such Writ

H

with-

within seven Years, after such Imperfection removed; and if it happen, that he dies, hanging the Suit, his Heir may undertake it, within one Year after the seven Years.

XI. R E M A R K.

If a Man during his Lunacy make a Feoffment in Fee, tho' he shall in Pleading never avoid it, by saying that he was a Lunatick, at the time of his Feoffment, yet twelve Men, upon their Oaths may find the Truth of the Matter; and so the Feoffment may be avoided by the King, for the Benefit of the Lunatick.

Co. Litt. 247. a.

XII. R E M A R K.

All Acts which a Man doth during his Lunacy, are equivalent to Acts done by an Idiot, or he who is utterly *Non compos mentis*; but Acts done by himself, *Inter lucida intervalla*, when he is of sound Memory, shall bind him: And this is agreeable to what *Bracton* hath pronounced in the Case of such as enjoy their lucid Intervals; his Words are: *Furiosi non multum distant a Brutis, quæ ratione carent, nec valere debet quod cum talibus agitur durante furore, possunt enim quidam dilucidis gaudere intervallis, & quidam habent furorem perpetuum. Quod autem actum fuerit cum talibus tempore quo dilucidis gaudent intervallis, ratum erit ac si cum aliis ageretur, siue furorem simulaverint, siue non.* With *Bracton* concurs *Fleta*, as you may see in *Lib. 6. cap. 40. nu. 1.*

4 *Co. Beverley's Case.*

Lib. 5. tract. 5. c. 20. nu. 1.

tervals; his Words are: *Furiosi non multum distant a Brutis, quæ ratione carent, nec valere debet quod cum talibus agitur durante furore, possunt enim quidam dilucidis gaudere intervallis, & quidam habent furorem perpetuum. Quod autem actum fuerit cum talibus tempore quo dilucidis gaudent intervallis, ratum erit ac si cum aliis ageretur, siue furorem simulaverint, siue non.* With *Bracton* concurs *Fleta*, as you may see in *Lib. 6. cap. 40. nu. 1.*

XIII. R E M A R K.

If a Lunatick levy a Fine, and declares the Uses of it thereupon, by his Deed, he shall be bound, as being a part of the Operation of the Fine. *Hobart's Reports* 224. *Needler v. Bishop of Winchester*, 10 Co. 42. *Mary Portington's Case*, and 2 Co. f. 58. *Beckwith's Case*.

XIV. R E M A R K.

A Copyholder that is a Lunatick, cannot forfeit his Copyhold Estate. *Sheppard*, c. 22. p. 172. 4 Edit.

XV. R E M A R K.

A Lunatick, who is Lord of a Copyhold Mannor, may grant Copyhold Estates for any time, according to the Custom of the Mannor, as any other Person may do, and the Estates made by him are unavoidable. *Sheppard* p. 109. 4 Co. *Clerk & Pennifather's Case*.

XVI. R E M A R K.

If a Lunatick be Steward of a Mannor, all Acts that he doth, according to his Office, are good in Law. *Sheppard's Court-Keeper's Guide*, p. 115. cap. 19.

XVII. R E M A R K.

A Surrender, or Grant of Copyhold Land, may be made to a Lunatick. *Sheppard's Court-Keeper's Guide*, c. 19. p. 118; 119.

XVIII. REMARK.

A Lunatick, in his mad Fits, cannot Attorn to a Grant, for that he who hath no Understanding cannot make an Agreement to the Grant, *Co. Lit. f. 315. a. 18 E. 3. 53. 6 Co. 69. a.* Sir *Moil Finch's* Case. But a Man that is deaf and dumb, tho' he hath no Understanding, may Attorn by Signs. *26 E. 3. 63. Co. Lit. 315. a.*

XIX. REMARK.

If a Lunatick Man, during the time of his Furor, or Infanity of Mind, make a Feoffment, &c. he cannot enter, nor have a Writ, called *Dum non fuit compos mentis*; but after his Death, his Heir may well enter, or have the said Writ at his choice. The same Law is, where an Infant within Age makes a Feoffment, and dies, his Heir may enter, or have a Writ of *Dum fuit infra etatem*; But with this difference, that the Writ of *Dum fuit non compos mentis*, lieth for the Heir of him that was *Non compos mentis*, and not for himself; but a *Dum fuit infra etatem*, lieth as well for the Ancestor himself, after his full Age, as for his Heirs. *Lit. sect. 406. Co. Lit. f. 247. b.* *Wingate* in his Body of the Common Law of England, c. 25. n. 20, 21, 22, 23.

XX. REMARK.

A Mad-man, or a Lunatick, may be imprisoned by another, to prevent killing of him, or burning his House, and justifiable. The Lord *Hobart* says, That the necessity of avoiding greater Inconvenience, is a good Plea in Law; as where one kills a Thief, or a Burglar, in

22 E. 4. 45.

Moor v. Hufsey, f. 96.

in defence of his Person, or House; so also is the binding and beating of a Person Mad or Lunatick.

To prevent Mad-men from doing Mischief to themselves, or others, hear what the old Roman Law says concerning them:

Furiosi, si non possint per necessarios contineri, eo Remedio per præsidem obviam eundum est; scilicet, ut Carcere contineantur, & ita divus pius rescripsit. D. I. 18. 13. 1.

Ulpianus.

Cum autem ex literis tuis cognoverimus, tali eum loco, atque ordine esse, ut a suis, vel etiam in propria villa custodiatur: Re-cte facturus nobis videris, si eos a quibus illo tempore

A Rescript sent to Scapula Tertyllus, from the Emperors Marcus and Commodus, occasioned by a Parricide, committed by one supposed mad.

observatus esset, vocaveris, & Causam tantæ negligentiae excusseris; & in unumquemque eorum, prout tibi levare, vel onerare culpa, ejus videbitur constitueris. Nam Custodes furiosis non ad hoc solum adhibentur, nequid perniciosius ipsi in se moliantur, sed ne aliis quoque exitio sint. Quod si committatur, non immerito culpæ eorum adscribendum est qui negligentiores in officio suo fuerint. D. I. 18. 14. Which may be Englished thus:

Whereas we understand by your Letters, that he is kept at his Country-House, by Servants, and Friends, of his own; you shall do well to call before you, such as at that time attended him, and to examine thoroughly how, and by what negligence the Fact happen'd to be committed, as you shall find any of them more or less faulty, to censure them accordingly: For Guards, or Keepers, are appointed for Mad-men, not only to look that they do not Mischief to themselves; but also, that they be not destructive to others; which if it be

done, it may be well imputed to their Fault, who were more negligent than was fit in their Employment.

I cannot pass over here in Silence, the Madness of *Cleomedes*, the King of the *Lacedemonians*, and how he was handled to prevent his playing mischievous Pranks.

Si opus sit (saith the Physitian *Jacobus Wickerus*) *furiosi ligamentis constringendi sunt, quemadmodum Cleomedi Lacedæmoniorum Regi contigit, qui cum ad Insaniam redactus, sceptrum unicuique obvio in faciem impingeret, ligneis soleis constrictus est a propinquis, & in Carcerem conjectus. Fit autem non solum, ut ne aliis, sed ut nec sibi ipsis vim inferant, quam inferre aliis nequeant: Perinde ac Cleomedes, qui arrepto Custodis & Ergastularii gladio, ab ima Corporis parte ad verticem se dissecuit.*

In his *Syntaxes Medicinæ*, l. 2.
Pars 2. p. 308. *De Furoris Curatione.*

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XXI. R E M A R K.

In a Bill brought by the Attorney-General, in the Nature of an Information, on the behalf of a Lunatick, it has been declared, That it is as needful to make him a Party, as an Infant, where a Suit is on his behalf: But in the Case of an Idiot it must be otherwise; but a Lunatick may recover his Understanding, and then he is to have his Estate in his own disposing. *Term Mich. 21. Car. 2. Woolrich a Lunatick, v. in Cancellaria.*

S E C T. III.

The. Queries with their Solutions, relating
to Lunaticks.

I. Q U E R Y.

*Whether the Testament made by a Lunatick, during his
mad Fits, be valid in Law, when he is come to him-
self?*

S O L U T I O N.

Such as are Lunaticks, can make no Testament, during
the time of their Furor, or Mad Fits; no, not so much
as *ad pios usus*: Nay, the Testament made at such a time,
shall not stand good, when the Madness is past. *Swin-
burn* in his *Treatise of Testaments and Last Wills*, Part 2.
Sect. 3. Of Mad Folks, and Lunatick Persons, & *Dr.
Godolphin* in his Tract, entituled, *The Orphan's Legacy*,
Part 1. c. 8. nu. 2. Instit. 2. 12. 1. c. 6. 22. 9.

II. Q U E R Y.

*Whether a Testament can be made by a Lunatick Person,
betwixt his Fits?*

S O L U T I O N.

If a Lunatick Person hath clear, or calm Intermissions,
then during the time of
such their Quietness, and
Freedom of Mind, he may
make his Testament, ap-
pointing

Swinburn, Part 2. § 3. Or-
phan's Legacy, Part 1. Cha-
pter 8.

pointing an Executor, and disposing of his Goods at his pleasure : So that neither the Furor, or Madness going before, nor following the making of the Testament, doth hinder the same Testament begun, and finished in the mean time.

The Lawyer *Caius* saith thus : *Hi qui furiosi, id est, mente insani fuerint, non possunt facere testamenta.*

Lib. 2. tit. 2. de Testamentis. *Sed hii qui insani sunt : Si intervalla ipsius insaniae habent, per intervalla, quibus sani sunt, possunt facere testamenta.*

The Emperor *Justinian* speaks in this manner, both in his *Institutes*, and in his *Code* :

Furiosi, si per id tempus fecerint testamentum, quo furor eorum intermissus est, jure testati esse videntur. *Instit. 2. 12. 1.*

Sancimus tale Testamentum hominis qui in ipso actu Testamenti adversa valetudine tentus est, pro nihilo esse. Si vero voluerit, in dilucidis intervallis aliquod condere Testamentum, vel ultimam voluntatem, & hoc sana mente inceperit facere, & consummaverit, nullo tali morbo interveniente stare Testamentum, sive quamcunque ultimam voluntatem censemus, &c. c. 6. 22. 9.

III. QUERY.

If a Testament be made by a Lunatick Person, and the time of the making unknown, whether this Testament be good, or no ?

SOLUTION.

If a Lunatick Person, or one that is besides himself at some times, but not continually, make his Testament, and it is not known, whether the same were made whilst he was of sound Mind and Memory or no ; then, in case
the

the Testament be so conceived, as thereby no Argument of Frenzy, or Folly, can be gathered, it is to be presum'd, that the same was made during the time of his Calm, and clear Intermi-

Vasq. de Success. progress. lib. 1. § 9. n. 90.

ssions; and so the Testament shall be adjudged for a good Testament. Yea, altho' it cannot be proved, that the Testator useth to have any clear and quiet Intermiissions at all, yet nevertheless 'tis supposed, that if the Testament be wisely, and orderly framed, the same ought to be accepted for a lawful Testament. But if in the Testament there be a mixture of Wisdom and Folly, 'tis presumed, that the same was made,

Angel. in L. Furiosum, c. qui Testa. fac. poss.

during the Testator's Frenzy; insomuch, that if there

be one word sounding to Folly, it is presum'd, that the Testator was not of sound Mind and Memory when he made the same; And therefore in this Case is the Te-

Idem Angel. in eadem L. Furiosum.

stament void, unless it may be proved, that there was Intermiission of *Furor* the same time. *Swinburn* in his *Treatise of Testaments and Last Wills, Part 2. Sect. 3. f. 38. b. 39. a. Edit. 1590.*

IV. Q U E R Y.

Whether the Dying seised of a Bastard Eigne, without Interruption, shall bar the Right of a Mulier Puisne, that is a Mad-man, or a Lunatick?

S O L U T I O N.

According to some: If a Man be seised of Land, and hath Issue two Sons, Bastard Eigne, and Mulier Puisne, and the Father dieth seised, the Mulier being beyond Sea,

8. Co. f. 101. Lechford's Case.

or within Age, or Imprisoned, or *Non sanæ Memoriae*, and the Bastard Eigne entreth, and continueth in peaceable possession of the Lands, and hath Issue, and dieth, and the Lands descend to his Issue, the Right of the *Mulier* in all the said Cases is bound for ever : And others hold the contrary.

V. Q U E R Y.

Whether a Lunatick can be prejudiced by Laches of suing Livery?

S O L U T I O N.

Sir Ralph Burcher being seised of divers Mannors in the County of York, holden in
Hobart's Rep. f. 137. Burchers Case.

Chief, died seised Anno 40 Eliz. and the same descended to William Burcher ; presently after his Death, it

Lunatick sueth not Livery ; no mean Rates run against him.

was found by Office before Commissioners, in the

County of Middlesex, that the said William Burcher was a Lunatick, and so had been long before the Death of his Father, and that he was seised of the said Mannors ; and the Queen granted the Custody of him, and his Lands to Sir Francis Barrington. After which 42 Eliz. there was an Office found in the County of York, of the Seisin of Sir Ralph ; his Death, and Heir, *ut supra* ; and that he

was of full Age : And it was resolved, That the King was not to have any mean Rates in this Case for default of Livery sued, or ten-

And Livery was due to him, and the Law presumes that he would have sued, it being for his Benefit if he had been Compos mentis.

dred ; because no Laches could be imputed unto the Heir, being Lunatick before, and ever since the Death of his Ancestors, and the Laches of his Friends shall not hurt him ; otherwise it were, if at any time he had been *Sanæ Memoriae* since the Death of his Ancestors. And there

was

was shewed unto the Judges the like Decree, made *Mich. 10 Jac.* in the Cause of one *Vaughan*, which the Attorney of the Court of Wards said, was made as a Decree of Equity ; but they resolved also, it was a good Decree in Law, upon the Reason aforesaid ; not because the King had seised and committed by force of the Lunacy, for that would have changed with the King's better Estate ; for it is better for the King to hold for default of Livery, than for Lunacy.

VI. QUERY.

Whether a Lunatick be punishable for hurting a Man ?

SOLUTION.

If a Lunatick kill a Man, this is no Felony ; because Felony must be done, *Animo Felonico* ; yet in Trespass, which tends only to give Damages, according to Hurt or Loss, it is not so : And therefore if a Lunatick hurt a Man, he shall be answerable in Trespass, and therefore no Man shall be excused in Trespass (for this is the Nature of an Excuse, and not of a Justification, *prout ei bene licuit*) except it may be judged utterly without his fault.

Hobart's Reports, f. 134. Weaver v. Ward.

VII. QUERY.

Whether a Devise by a Lunatick, be aided by the Statute of 43 Eliz. Of charitable Uses ?

SOLUTION.

Collison, 15 H. 8. devised an House in *Eltham*, in *Kent*, to *Lettice* his Wife,

Hobart's Rep. 136. Collison's Case.

for

for Life; and after her Death, made one *John Bricket*, and others, Feoffees (as he called them) in the said House, to keep it in Reparations, and to bestow the rest of the Profits upon the Reparation of certain High-ways there: *Collison* and his Wife are dead, and the House is descended to one *Oliver Rolt*, an Infant. This Case being in the Chancery between the Parishioners and *Rolt*, was referred by the Court to *Hobart* and *Tanfield*; and they resolved clearly, that it was within the Relief of the Statute of 43 *Eliz.* for tho' the Devise was utterly void, yet it was within the Words, [*limited and appointed to charitable Uses.*] Otherwise, if he were an Infant Lunatick, or the like, that gave it, or that one appointed that that were not his own, to charitable Uses.

VIII. QUERY.

Actions touching a Lunatick's Lands, whether they must be brought in his own Name?

SOLUTION.

One *Cockes* brought an Action of Trespass of Trover, and Conversion of Beans, against *Darson*, and coming to Trial at the Assizes, upon
Hobart's Rep. 215. *Cockes v. Darson.* Not Guilty, because it was a small Cause, the Judge took not the Jury, but directed to move the Court, and so it was; and the Cause was, That the Lands whereupon the Beans grew, were a Lunatick's, and Copyhold, and the Lord had granted unto one, the Custody of the Land, by whose Leave and Assent the Plaintiff did sow the Land. And the Court was of Opinion, That the Action was to be brought in the Name of the Lunatick: For there was no Interest gained in his Land by this Commitment.

That

That an Action must be brought in the Name of the Lunatick, I shall subjoin what *Popham* has reported in the Matter.

The Custody of a Copyholder, that was a Lunatick, was committed to *J. S.* and for Trespass done upon his Land, it was demanded of the Court, In whose Name *J. S.* should bring the Action? And their Opinion was, That it should be in the Name of the Lunatick.

Popham's Rep. f. 141. Darcy's Case in the Common Pleas.

IX. QUERY.

Whether the Lord of a Mannor can grant the Custody of a Copyhold, belonging to a Lunatick, without a special Custom?

SOLUTION.

Lord Chief Justice *Hobart* did not agree, That the Lord hath power over the Lunatick's Land, without a special Custom; for the Imitation of the King's Power over Freeholds, makes no Consequence: For, tho' he takes the Statute to be but an Affirmance of the Common Law in the Case of the King, yet the Collateral Incidents of Estates, as *Dower, Tenancy by the Courtesie, Wardships*, and the like, are not without special Custom.

Hobart's Reports, f. 215, 216. Cockes v. Darson.

That Copyhold Estates shall not have such Qualities as Estates at Common Law, without special Custom. See more 4 Co. f. 21. *Brown's Case*, f. 22. *b. Rivet's Case*, f. 23, *Deal & Rigden's Case*, f. 23. *Bullock & Dibley's Case*, Cro. Eliz. f. 391. Pl. 14. *Clun v. Pease*, and *Turner*; and *Palter v. Cornhill*, f. 361. Pl. 22.

X. QUERY.

Whether the Acts of a Lunatick, during his Intermissions, or lucid Intervals, be binding?

SOLUTION.

The Acts that Lunatick Persons do, during the time of their *Lucida Intervalla*, tho' it be by Deed in the Country, as by Feoffment, Obligation, or the like, shall bind them, and others concerned in it, as any other Men are by their Acts bound. *Sheppard* in his Abridgment, Part 2. Tit. Idiot. 4 Co. f. 125. a. *Beverley's Case* of *Non compos mentis*. *Bracton*, lib. 5. tract. 5. de Exceptionibus, c. 20. nu. 1. f. 420. b. *Fleta*, lib. 6. c. 40. n. 1.

XI. QUERY.

Whether the King, who is to keep the Lunatick, his Wife, and Children, with the Profits of the Lands, can grant them over to the proper use of another Person?

SOLUTION.

In Trespass *Quare clausum fregit*, and cutting his Trees, in *Paddington*, in the County of *Middlesex*, by

Hil. 28. H. 8. Rot. 401. in the Common Pleas, Francis & Holms Case, Dyer, f. 25. b. 26. a. Pl. 164. Edit. 1688. 4 Co. 128. b. Beverley's Case.

John Francis, against *William Holms*. The Defendant pleaded, that it was found by Office before the Escheator of the said County of *Middlesex*, that the

said *John Francis* was a Lunatick, and that he was seized in Fee of the Land in which, &c. for which the King seized his Person, and his Land, and by his Letters Patents granted

granted the Rule, Government, and Custody of the same Person, and Lands to the said *Holmes*, *Quamdiu*, that the Person was Lunatick, to take the Profits to his own use, and so justified, and prayed in Aid of the King, and thereupon it was demanded in Law, If he should have Aid or not? And it was adjudged, That he should not have Aid of the King, for this Grant was utterly void; for the King is bound to keep the Lunatick, his Wife, Children, and Household, with the Profits of the Lands, and without taking any thing to his own use, but all to the use of the Lunatick, and his Family, and all to the intent, that the King may provide, that he who wanteth Reason, should not alien his Lands, and waste his Goods. And the King after Office found, hath only Provision, and hath not any Custody of the Body, or Lands of a Lunatick, as he hath of an Idiot, and he hath nothing to grant over: But if the King provides one to have Care, and Charge of him, who is *Non compos mentis*, that his Family shall be maintained, and that nothing be wasted; or if one of his own Head taketh so much upon himself, in this Case, he is but as Bailiff of him that is *Non compos mentis*, and shall be accountable to him as Bailiff, or to his Executors, or Administrators; and he cannot cut down Trees, but for necessary House-boot, Plough-boot, and Cart-boot, and to repair the ancient Pales, and all that the Bailiff may do, he may do, and not otherwise.

XII. Q U E R Y.

Whether the Committee of a Lunatick, can grant Copyhold Estates?

S O L U T I O N.

The Committee of a Lunatick cannot grant Copyhold Estates, but he himself may do so by his Steward, as appears by this subsequent Resolution.

A. seized of a Mannor for Life, where there were many Copyhold Estates, grantable by Copy of Court-Roll for Life, in Possession, and for another in Reversion, granted the Stewardship by Deed, under his Hand and Seal, to *J. S.* for Life, with a Fee for executing thereof; and after he became a Lunatick, and *Non compos mentis*, and so was found by Inquisition, who was committed to *J. D.* under the Seal of the Court of Wards: The Question was, Whether the Steward, by the Consent of the Committee, or the Committee himself, by their Steward, might grant Copyhold Estates, according to the Custom of the Mannor? It was resolved by *Hobart*, Chief Justice, and *Tanfield*, Chief Baron, That the said Committee could not grant any Copyhold Estate; for that they themselves, by Law, had no Estate in the Mannor, nor are Lords thereof, for the time being; but that the said Lunatick, by his Steward, might grant Copyhold Estates, according to the Custom of the Mannor.

Trin. 9 Jac. in the Court of Wards, Blewits Case, Leonard 47, 48.

XIII. QUERY.

If a Dean of Paul's happen to be a Lunatick, who shall have the Custody of him?

SOLUTION.

In the Reign of *H. 8. Pace*, Dean of the Cathedral Church of *St. Paul*, was in the Custody of the Arch-Bishop of *Canterbury*, being a Lunatick, the Question was, in the Court of Wards, Who shall have the Custody? And upon Precedents shewn, it clearly appeared, That the Arch-Bishop ought to have him in Custody, and not the King: Which Precedents were cited by one *Master Eyres*, in his Reading at *Lincoln's-Inn*.

Vide Dyer, Edit. 1688, where this Case is cited in the Margin.

XIV. Q U E R Y.

If a Man, in Criminal Cases, be suspected to counterfeit Madness, or Lunacy, how shall it be discerned, whether he be mad, or no?

S O L U T I O N.

Lunacy, Madness, or Frantickness, counterfeited, shall be enquired after, by an Inquest impannelled for that

Savil's Rep. p. 50. nu. 105.

purpose, as appears in the Case of one *Somerville* : For at a Meeting of the Justices, it was demanded by the Queen's Council, If *Somerville*, having been suspected for a Lunatick in times past, should now prove to be of the same State, or Condition, upon his Arraignment, by *Covin*, or otherwise in Verity, what shall be done in the Case? To which Demand, after divers Arguments, it was answered, That an Inquest should be Impannelled to enquire, Whether it was of Malice, or no, &c.? And it was likewise resolved by the Opinion of all, That if he should be found a Lunatick by *Covin*, or Dissimulation, he shall be tried upon the principal Matter, and not condemned to *Pain Fort*, & *Dure*, as in Cases of Felony : But if he will not answer directly, being of *Sane Memory*, he shall be condemned upon a *Nilil dicit* ; and notwithstanding he shall have the Judgment that belongs to High-Treason, and not his Penance *Fort*, & *Dure* : And if he be found a Lunatick, his Trial must be deferred till he be of sound Memory. But it was fully and absolutely agreed, That if *Somerville* plead the General Issue, *Non Culp.* that if afterward he upon Evidence shall come, and not speak directly, yet he shall not be taken for a Mad-man, or Lunatick, for that he has once answer'd directly.

Add hereunto the Case of a Felon, reported by Judge
Anderson 1. 107. *Anderson*, where the Felon

upon his Arraignment appeared to be mad ; and it was held, That it should be enquired of, by an Inquest of Office ; if he were mad indeed, or in shew only ; and if it be found, that he does dissemble, then the Judge may put him to answer, if the Felon will ; and if he will not answer, the Judge may pass Judgment against him.

Pain Fort, & Dure.

Thus much for the Law of *England* : Now we will see how the Civil Law runs, in the Case of Parricide, committed by one supposed Mad, or Lunatick.

Divus Marcus, & Commodus Scapula Tertyllo rescrip-

Macer lib.2. de Judiciis publicis. D. 1. 18. 14.

serunt in hæc verba : Si tibi liquido compertum est, Alium priscum, in eo furore esse, ut continua mentis alienatione omni intellectu careat, nec subest ulla suspitio matrem ab eo simulatione

Simulatus furor pœna dignus D.1.18.13.1. in fine D.27.10.6.

dementiae occisam, potes de modo pœnæ ejus dissimulare, cum satis furore ipso puniatur, & tamen diligentius custodiendus erit, ac, si putabis, etiam vinculo coercendus, quoniam tam ad pœnam, quam ad Tutelam ejus, & securitatem proximorum pertinebit. Si vero ut plerumque adsolet, intervallis quibusdam sensu saniore, non forte eo momento scelus admiserit, nec morbo ejus danda est venia, diligenter explorabis : Et siquid tale compereris, consules nos, ut æstimemus, an per immanitatem facinoris, si, cum posset videri sentire, commiserit, supplicio adficiendus sit. In English thus : Marcus, and Commodus, the Emperors, being consulted by Scapula Tertyllus, concerning Aelius Priscus, who had killed his Mother, advised as followeth : If it clearly appear unto you, that Aelius Priscus was so distracted, with a total continued Defect of Understanding, that

there

there could be no suspicion, that in a dissembled Madness, his Mother was killed By him, you may desist from the Punishment of him, his Madness it self being a sufficient Punishment : Yet you are to take care, that he be kept in more closely ; because such Restraint ought to be used for his Punishment and Preservation, and also for the Security of others. But if, as oftentimes it happens, his Madness takes him by Fits, and at the time of the Villany committed he was free, he ought not to be excused by colour of his Disease ; and touching this, you are to make good Enquiry, that we being informed, may determine of the Foulness of the Fact.

XV. QUERY.

A Bargain by a Lunatick, before the Lunacy found, whether avoidable, by being found a Lunatick, with a Retrospect of several Years ?

SOLUTION.

Sir Geoffry Palmer, the King's Attorney-General, on the behalf of *Ferome Smith*, a Lunatick, against Sir Robert Parkhurst, and others.

De Term. Sanct. Mich. Anno Regis 20 Car. 2. in Cancellaria, Smith a Lunatick against Sir Robert Parkhurst.

The Bill did suggest, that by Inquisition taken before the Mayor of London, by Virtue of a Writ to him directed, the said *Ferome Smith* was the 23d of June, 1664, found a Lunatick, and had *Lucid Intervals*, and had not sufficient Government of Himself, his Lands, and Goods ; and that he was Lunatick the last of June, 1647 ; and during his Lunacy he had several Sums of Money due to him, which he had wasted, and alienated divers Goods ;

but to whom, the Jurors were ignorant. And did charge, that one *Archibald* owed the Lunatick, during his Lunacy, 1300 *l.* by good Security; and that in 1656, the Defendant caused the Lunatick to assign *Archibald's* Debt to him, and had received the same, upon Colour of a Satisfaction given to the Lunatick for the same; whereas that pretended Satisfaction was not valuable, and was done in prejudice of the Lunatick: And to have an Account of 1300 *l.* and to be relieved, was the Scope of the Bill.

The Defendant sets forth by Answer, That he sold the said *Ferome Smith*, in 1656, a Mannor, which he much desired to buy, at 1200 *l.* it being the Place of his Birth; *Ferome Smith* assigned *Archibald's* Debt for to satisfy himself the Purchase-Mony, and pay the Over-plus to *Smith*; which he did; and did convey the said Mannor to *Smith*, and insisted, that *Smith* was not a Lunatick at that time, and did usually buy, and sell, &c.

This being the Nature of the Case, it came first to be heard before Justice *Tyrrel*, who altho' it did appear, that the Defendant had conveyed the said Mannor to *Smith*, for the said 1200 *l.* and that *Smith* did at that time usually Barter, and was not found a Lunatick till eight Years after, with a Retrospect of seventeen Years, did order the Defendant to Account for the 1300 *l.* being *Archibald's* Debt, and to satisfy the same with Damages, without any Provision for the Defendant's having the Mannor again, or Account for the Mesne Profits. And tho' it was stood upon, at the Hearing, that in Case of a Lunatick, (where the King hath no Interest in his Estate, but as *Pater Patrie*, commits him to another to manage it for him, the Lunatick, in case he recover his Senses, and Wits, shall have his Estate again; and if not, it will go to his Administrators) the Lunatick himself (as in the Case of an Infant) ought to have been a Party: Yet that Opinion was overruled by the Judges, and by the Lord-Keeper, on a Re-hearing: But the Lord-Keeper did stay the passing that

Decree

Decree, and gave Liberty to the Defendant to traverse the Inquisition.

Out of this Decree may be collected these Notes :

1. *That the Party is admittable to traverse the Inquisition, if he pleases.*
2. *That generally a Lunatick ought to be made a Party.*
3. *That the Reason why it was over-ruled, in the Case aforesaid, was, because he might stultifie himself.*

XVI. Q U E R Y.

Whether the View of Land, according to the Statute of Westm. 2. c. 48. be grantable in all Cases to Infants, to Men in Prison, to Lunaticks, or such-like.

S O L U T I O N.

Upon these Words of the Statute of *Westm. 2. c. 48*
Sc. In omnibus brevibus per quæ tenementa petuntur Ratione dimissionis, &c. Sir Edward Coke, (and that agreeable to the Books cited in his Margent) commenteth thus: Here, as in many places [*Demise,*] is applied to an Estate, either in Fee-simple, Fee-tail, or for Term of Life, and so commonly taken in many Writs. But this Act extendeth not to every kind of Demise, or Conveyance; for if the Demise, or Conveyance, be by Fine, or other Matter of Record, this Branch extends not to it; for, regularly, Conveyances, or other Acts of Record, acknowledged, or made by one that is *Non compos mentis*, or by Dureffe of Imprisonment, are unavoidable by him, or his Heirs, by Law; and such Conveyances, or other Acts of Record, acknowledged, or made by an Infant, are also unavoidable,

ble, unless he doth avoid them by Writ of Error, or *Audita Querela*, during his Minority; and therefore this Branch is to be understood of Alienations made in *Pais*, and not by Matter of Record, *Co. 2. Inst. f. 483.*

Having given some Account of our Lunatick Person, and that by way of Description, Remark, and Query, I am now to speak of the Drunken, and Cup-shot Man, that is *Non compos mentis*, by his own Folly.

PART

PART the Fourth.
Of Him that is Drunken.

SECT. I.

A Drunken Man, how described.

THE Fourth Sort of *Non sane Memories*, according to the Law of *England*, is he that is Drunk ; one, that (not by the Visitation of God, but) by his own vicious Act and Folly, is so overcome with Drink, that he is deprived, for a time, of the free Use and Exercise of his Reason and Understanding. *Coke* in his Comment on *Littleton*, sect. 405. f. 247. a.

SECT. II.

Remarks concerning Drunkenness, and him that is Drunken.

WHERE Drunkenness Reigns, there Reason is an Exile ; Vertue a Stranger ; God an Enemy ; Blasphemy is Wit ; Oaths are Rhetorick ; and Secrets are Proclamations. *Noah* discovered that in one Hour drunk, which sober, he kept secret Six hundred Years. See *Francis Quarles*, in his *Enchiridion*, Cent. 3. cap. 14.

II. REMARK.

Drunkennes is the Vice of Brutish Men, and of no worth, for it leads a Man to all unworthy Actions; witness *Alexander*, otherwise a great Prince, being overcome with this Vice, killed his dearest Friend, *Clitus*; and being come to himself, would have killed himself, for killing *Clitus*. *Charron*, in his Treatise of Wisdom, *Lib. 3. c. 39.* & *Peter de la Primandaye*, in his *French Academy*, *cap. 20.*

III. REMARK.

That which we do, being Evil, is notwithstanding by so much the more pardonable, by how much the Exigence of so doing, or the Difficulty of doing otherwise is greater; unless this Necessity, or Difficulty, have originally risen from our selves; it is no Excuse therefore unto him, who being Drunk, committeth Incest, and alledgeth, that his Wits were not his own; inasmuch as himself might have chosen, whether his Wits should by that means have been taken from him. *Hooker*, in his *Ecclesiastical Policy*, *Lib. 1. sect. 9. p. 69.*

IV. REMARK.

Lot's Daughters made their Father drunk, and then they lay with him; but he knew it not: Whereupon *St. Augustin* passeth this Sentence on him, *That he deserved to be punished, not for Incest, but for his Drunkennes.* *Decreti Secunda*

Inebriaverunt Loth filiae ejus, & se nescienti miscuerunt. Quapropter culpandus est quidem: non tamen, quantum ille incestus, sed quantum illa meretur Ebrietas. Augustinus, l. 22. contra Faustum, c. 44.

Pars Causa 15. Quæst. 1. c. 9. Grotius de jure belli & pacis, l. 2. c. 20. sect. 19. in fine.

V. R E M A R K.

The Moralists in resolving the Quest. *Whether Ebriety can excuse, or extenuate a Fault?*

do make a Distinction betwixt Actual, and Habitual

Windelinus's Moral Philosophy, l. 1. de Recta Vita, c. 16. qu. 1.

Drunkenness: The former is, when any Man beside Intention, being ignorant as well of the Weakness of his Brain, as of the Strength of the Liquor, is overcome with it. The latter is, when a Man is delighted with it, and knowingly, and willingly, makes himself Drunk. That of Actual Drunkenness does, they say, somewhat excuse and extenuate the Fault; and consequently, there is allowed some mitigation of the Punishment: But that which is termed *Habitual Drunkenness*, does not at all excuse the Fault committed, nor mitigate the Punishment. And this is that which *Pittacus* intended, when he enacted a Law, That such a Person as should commit a Fault in a drunken Fit, should be liable to a double Punishment; one for his Drunkenness, and the other for his Ignorance: For as in the Wine there is Poyson, so in a voluntary Ignorance there is a heinous Offence.

VI. R E M A R K.

This kind of *Non compos mentis*, according to our Law, shall give no Priviledge, or Benefit, to him, or his Heirs, in Civil Matters: And as for Criminal Matters, a Drunkard, who is *Voluntarius Dæmon*, hath no Priviledge thereby; but what Hurt, or Ill, soever he doth, his Drunkenness doth aggravate it: *Omne Crimen Ebrietas, & incendit, & detegit*, Coke in his Comment on *Littleton*, sect. 405. f. 247. a.

S E C T. III.

The Queries with their Solutions, relating to him that is Drunken.

I. Q U E R Y.

Whether a Man's Drunkenness can be any good Plea in the Courts at Westminster, either in Criminal, or Civil Acts?

S O L U T I O N.

THE Judges, in *Beverley's Case*, tho' they have admitted a drunken Man to be, for the time, a *Non compos mentis*; yet have pronounced, that his Drunkenness shall not extenuate his Act, or Offence, nor turn to his Avail, but it is a great Offence in it self, and therefore doth aggravate his Offence, and doth not derogate from the thing he doth in that time, and that in Case as well touching his Life, as his Goods, Chattels, or Lands, or any other thing, concerning him.

The Rule, *Necessitas inducit privilegium quoad Jura privata*, doth vouchsafe to admit an Exception, when the Law doth intend some

The Lord Bacon, in his Collection of Maxims, Regula 5. p.25. Edit. 1639.

Fault,

Fault, or Wrong, in the Party that hath brought himself into the necessity; so that is *Necessitas culpabilis*; as for Example: If a Mad-man commit Felony, he shall not lose his Life for it, because his Infirmary came by the Act of God: But if a drunken Man commit a Felony, he shall not be excused, because his Imperfection came by his own default; For the Reason, and Loss of Deprivation of Will, and Election by Necessity, and by Infirmary is all one, for the lack of [*Arbitrium Solutum*,] is the Matter: And therefore as *Infirmity culpabilis* excuseth not, no more doth *Necessitas culpabilis*.

Co. Litt f. 247. b.

21 H. 7. 31.

So that it appears, that if one through his own fault becomes *Non compos mentis*, or Mad; and that if through the Violence of the same Madness, he hurt another, he hath therein committed a Crime, and deserves to be punished.

II. QUERY.

A Drunken Person, whether he may make a Testament?

SOLUTION.

He, (saith *Swinburn*) that is overcome with Drink, during the time of his Drunkenness, is compared to a Mad-man; and therefore, if he make his Testament at that time, it is void in Law: Which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of Reason and Understanding. Otherwise,

Treatise of Testaments, and last Wills, Part 2. Sect. 6.

therwise, if he be not clean spent, albeit his Understanding be obscured, and his Memory troubled, yet may he make his Testament being in that Case.

We will subjoyn to what *Swinburn* has said for the Solution of our Question, the Words of *Dr. Godolphin* which are to the same effect.

Such as are drunk, during the time of being drunk,
 can make no Testament
Orphan's Legacy, Part 1. c. 8. that shall be good in Law ;
 § 5. p. 26. yet understand (says he) this
 is only when he is so exces-

sively drunk, that he is altogether deprived for the time, of the use of Reason and Understanding, being, according to the Flagon-phrase, as it were, dead drunk : For if he be but so drunk, that his Understanding is but somewhat clouded, and obscured, and his Memory troubled, he may in that Case, make his Testament, and it may be good in Law. He therefore that is but exhilarated with Liquor, and thereby doth but somewhat deviate from the Rule of right Reason, is not the Person whom the Law renders at that time Intestable ; but he who by a continual Custom of Topping, or by such an Excess of Drunkenness, hath so exiled his Intellects, that he hath as it were, totally lost the Rational, and reserved nothing to himself, but the Animal.

Concerning the drunken Man's Will, see more in *Vasquez de Success. Crea. lib. 2. sect. 13. Requis. 7. n. 8.*
 & *Simon de pratis de inter. ult. vol. lib. 2. dub. 1. soluc. 4. n. 22.*

III. QUERY.

Such as violate the good Name of others, with opprobrious Words, through Weakness of their Brain, either by Frenzy, Drink, or other Lightness, how are they to be dealt withal?

SOLUTION.

The Lawyers tell us, That defamatory Words are uttered, either upon some Rancour and Malice, by some that envy another, with intent to defame him, and spread abroad a Matter of Disgrace upon him; or in some scoffing and jesting manner, so as facetious and merry Men use to do, to make the Company merry wherein they are; or they are spoken by some that have some Weakness, or Distemperature in their Brain, either by Frenzy, Drink, or other Lightness, or by any Rashness in their Tongue.

Ridley's View of the Civil and Ecclesiastical Law, Part 3. cap. 7. sect. 1.

1. If the Cause of such Words be Rancour, or Malice, then are they altogether to be punish'd, for that there can be no just Excuse made for them.

2. If they be spoken in a jesting manner, to make the Company merry, if it be in a fine sort delivered, it is by Aristotle held to be a Virtue *; but if it be in homely and gross sort delivered, then is it accounted to be a kind of Rudeness, or Rusticity; but whether way so ever they be uttered, there is for the most part no advantage taken against them; unless thereby there follow any Dis-

In Greek, Εὐσημελία; in Latin, Urbanitas.

Discredit to the Party upon whom such Jests are broken ;
for then are they not with-

Lusus Noxius in Culpa est, D. I.
2. 10. D. 47. 2. 50. 4.

out blame : Neither can
that be called a Jest, or
Sport, whereby a Man's

good Name is hurt, or any Crime imposed upon him.

3. The like may be pronounced of such as speak hardly
of any, by the Lubricity of their Tongue, or Weakness

* *Nam & personam spectan-*
dum esse, an potuerit facere, &
an ante quid fecerit, & an cogi-
taverit & an sanæ mentis fuerit,
nec lubricum linguæ ad pœ-
nam facile trahendum est.
Quamquam ii temerarii digni
pœna sint, tamen ut insanis par-
cendum est. D. 48. 4. 4. 3.

of their Brain, through
Frenzy, or Drink, who for
that they are not thought
to speak such Words mali-
ciously, pass for the most
part unpunished * ; no, tho'
a Man in this Case speak ill
of the Prince himself : And
the Civil Law is so far from

taking hold of such Words in these Cases, that the Ro-
man Emperors themselves, viz. *Theod. Arcad.* and Ho-
nori^{us}, have in an ancient Constitution, extant in the Code
of *Justinian*, said of them thus :

C 9. 7. *Lex unic. Siquis Im-*
peratori malediderit.

† *Drunkennes, Temulentus,*
Drunken, Cup-shot ; of such see
more, D. 48. 3. 12. D. 48. 19.
11. 2. D. 49. 16. 6. 2.

Siquis Modestie nescius,
& pudoris ignarus, impro-
bo, petulantique maledicto
nomina nostra trediderit la-
cessenda, ac temulentia †, tur-
bulentus obrectator tempo-
rum nostrorum fuerit, cum

pœnæ nolumus subjugari, neque durum aliquid, nec aspe-
rum volumus sustinere : Quoniam si ex levitate processe-
rit, contemnendum est : Si ex insania, miseratione dignis-

simum : Si ab injuria, re-
*mittendum * : If any Man*
speak ill of the Emperor, if

Note, *Queen Elizabeth*, after
Sir John Perot was condemned
to die, was often heard to com-
mend the Rescript of those Emperors,
p. 411. *Engl. Edit.* 1635.

Cambden's Eliz. Anno 1593.

of Lightness, it is to be contemned; if of Madness, to be pitied; if of Injury, to be remitted.

I shall conclude the whole Tract, with a remarkable Example that I have met withal, and which I cannot here let go in Silence; and 'tis of the Prudence of *Dionysius*,

Peter de la Primauday, in his *French Academy*, c. 36.

us, the Elder, King of *Syracuse*, in punishing evil Speakers: ' This King being told, That two young Men, as ' they were drinking together, had spoken many outrageous Words of his Majesty; The King invited them ' both to Supper, and perceiving, that one of them, after he had taken a little Wine into his Head, uttered, ' and committed much Folly; and that contrariwise, the ' other was very stayed, and drunk but a little, the King ' punished this Fellow, as one that was malicious, and ' had been his Enemy of set purpose; but forgave the ' other as being drunken, and moved by the Wine to ' speak ill of him.

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